SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1930.

Original No. 24

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1920.

Original No. ....

Petition of the Chicago, Rock Island & Pacific Railway Company for a Writ of Prohibition or a Writ of Mandamus Directed to the District Court of the United States, Northern District of Ohio, Western Division.

To the Supreme Court of the United States:

The Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing under the laws of Illinois and Iowa, having its office and principal place of business in Chicago, Illinois, as ground for the relief prayed herein, says:

On October 22, 1914, Horatio C. Creith, a citizen and resident of Ohio, filed a creditor's bill in the District Court of the United States for the Northern District of Ohio, Western Division, against Toledo, St. Louis & Western Railroad Company, a resident and citizen of Indiana. The bill is entitled on the docket of the court: Horatio C. Creith, plaintiff vs. Toledo, St. Louis & Western Railroad Company, in equity No. 112.

The bill alleged that the defendant was indebted to plaintiff in the sum of $10,711.00 for materials sold within six months prior to the filing of the bill, and that its lines of railroad from Toledo, Ohio, to East St. Louis, Illinois, were subject to the lien of two issues of mortgage bonds dated July 1, 1900, one of $10,000,000. and the other $6,500,000. and an issue of $350.000. Equipment trust certificates dated Sept. 1, 1906. The validity of none of these securities is questioned; the order appointing a receiver authorized him to pay interest becoming due thereon. The trustee of the mortgages were not named as defendants.

The bill then alleged that on August 1, 1907, defendant issued $11,527,000.00 of Collateral Trust Gold Bonds, maturing August 1, 1917, by a collateral trust deed to Central Trust Company of New York as Trustee, pledging as security therefor 64,800 shares of the preferred stock, and 144,200 shares of the common stock of the Chicago & Alton Railroad Company; that defendant defaulted on the first day of August, 1914, on the payment of interest then due on said bonds, which contained provisions that upon such default continuing for 90 days the Trustee upon his own initiative or upon request of the holders of a majority thereof, should declare the principal due and payable. The bill alleged the imminence of a declaration of default on said bonds and of a multiplicity of suits by creditors, in whose behalf as well as in behalf of plaintiff the bill was filed, and prayed for the appointment

of a receiver and an injunction against the prosecution of actions against the road without the order and permission of the court, and that all such parties be required to intervene therein and assert their claims; and that a Master be appointed to take an account and report to the court the amount, character, lien and priority of all claims against the road.

On the same day defendant filed an answer admitting all the allegations of the bill and joining in the prayer for a receiver.

On the same day an order was entered upon the bill and answer appointing Walter L. Ross, receiver, and Clarence Brown, attorney for the receiver, with the usual powers, and with special authority to pay interest becoming due upon the $10,000,000.00 bonds of July 1, 1900, the $6,500,000.00 of July 1, 1900, and the $350,000.00 trust certificates of September 1, 1906. All persons were enjoined from prosecuting suits against the defendant without order and permission of the court and were required to intervene in said cause and assert their claims therein. Guy W. Kinney was appointed Special Master to take an account and to ascertain and report the amount, character, lien and priority of all claims and evidence submitted thereon. The receiver was directed to publish notice to the creditors that they should "within 60 days from the first publication of said notice, present their respective claims to him, duly verified, or that they file herein a bill of intervention, etc;" and that all creditors except

those holding claims upon which the receiver was ordered to pay the interest, and owners of claims for labor and supplies, who should fail to file their respective claims or bills of intervention within 60 days should be barred and not allowed to participate.

December 10, 1914, Edwin G. Merrill, R. Walter Leigh, H. V. Morton and Roberts Walker, as a committee under a protective agreement, dated August 3, 1914, in respect of defendant's Gold Bonds of 1917, filed a petition, to which a copy of the protective agreement was attached as an exhibit, showing that they were "vested under the terms of this agreement with the legal title to all the bonds and coupons which may at any time be deposited hereunder, and the depositors agree that the deposit of the said bonds and coupons, transfers, assigns and vests in the Committee complete and absolute title to the said bonds and coupons with the same force and effect as if the Committee were the absolute owner thereof;" and also that they were expressly empowered to sue on said bonds and coupons in their own names or in the names of the depositors under the agreement. The petition showed further that of the $11,527,000.00 face value of the Gold Bonds of defendant of August 1, 1907, referred to in the bill, there were issued and outstanding $6,480,000.00 of Series A and $5,047,000.00 of Series B; the two series being distinguished in respect to the amount of interest, series A, bearing interest at four per cent from their date, August 1, 1907, until maturity, August 1,

1917, and series B, bearing interest at two per cent from August 1, 1907, until July 31, 1912, and four per cent thereafter until maturity, August 1, 1917. It was shown further that on December 5, 1914, $4,340,000.00 of the series A and $5,047,000.00 of the series B bonds had been deposited with and were owned by the committee under the protective agreement. The petition asked dismissal of the bill on the ground that the suit was collusive between plaintiff and defendant and in fraud of the rights of the owners of the 1917 bonds, and in the alternative and if the prayer to dismiss be not granted that the petition be treated as an intervening petition, and that petitioners be given judgment for the $9,387,000.00 face amount of said bonds and interest.

The plaintiff Creith, on December 28, 1914, answered the petition of Merrill, et al., asserting in his answer that by filing the same, said petitioners had entered their appearance in the suit, and prayed that the petition be considered and held to be a petition of intervention, and that the Receiver be directed to defend against said bonds and that the same be ordered surrendered if found to be invalid.

On March 8, 1915, by leave of court, Merrill, et al., filed a dependent bill on behalf of themselves and other owners of the Gold Bonds of 1917, who might become parties, withdrew the petition filed December 10, and filed a motion for an order relieving their claims from the 60 days limitation, and a motion to consolidate said

two suits. May 27, 1915, the court denied the motion to consolidate and ordered the Bondholders' Committee made parties defendant with leave to file an answer and cross-bill, which they did August, 1915, preserving their objections to the suit and the order making them parties, and setting up their title, by deposit under the Protective Agreement, to $10,295,000.00 of the $11,527,000.00 Gold Bonds issued and outstanding, being all of the B bonds ($5,047,000.00) and $5,248,000.00 of the A bonds.

The $5,047,000.00 par value B bonds and $400,000.00 A bonds had been deposited with and transferred to the committee by the Chicago, Rock Island & Pacific Railway Company, the balance of the A bonds by other persons.

On March 5, 1917, Central Trust Company of New York, filed a cross bill as trustee under the collateral trust agreement of August 1, 1907, to foreclose the lien of the collateral trust bond holders on the shares of Chicago and Alton stock pledged by said agreement to secure said bonds.

On March 5, 1917, an order was made appointing Guy W. Kinney, Special Master, to take testimony upon the issues thus made up by the pleadings. A copy of the order is attached hereto. At that time the Chicago, Rock Island & Pacific Railway Company was not a party, or named as a party in any pleading.

At the beginning of the taking of testimony before

the Special Master on April 2, 1917, the appearances of counsel were formally noted by the master as follows:

> "The Central Trust Co. of New York, Joline, Larkin and Rathbone, Esqs. (by Henry B. Peer, Esq. of counsel). Edwin G. Merrill, et al., Bondholders' Committee by Spooner & Cotton, Esqs. (by T. M. Gordon, Esq. of counsel).
>
> Lawrence Maxwell, Esq., and J. P. Cotton, Esq. appearing for the Bondholders' Committee, Mr. Maxwell appearing to represent the interest of the Rock Island Company and Mr. Cotton representing the "A" bonds."

On March 1, 1918, defendant filed by leave of Court a pleading entitled:

"Answer of Toledo, St. Louis & Western Railroad Company to the answer and cross-bill of Edwin G. Merrill, et al., and cross-bill of Toledo, St. Louis & Western Railroad Company." It admitted that certain directors and officers of the company had attempted to authorize on behalf of the company the execution of the series A and series B Gold Bonds of 1917, and the mortgage to the Central Trust Company, and that an aggregate of $11,527,000.00 of said bonds had been delivered but alleged that the issue was void in that said directors and officers of defendant company had delivered said bonds to the Rock Island Co. as consideration for 63,800 shares of the preferred stock and 144,200 shares of the common stock of the Alton Railroad theretofore owned by the Rock Island Company, and that such action on the part of the directors was

ultra vires. It was further alleged that the price paid by defendant in its bonds for said stock was greatly in excess of the true value thereof; that Edwin Hawley a director and vice-president of defendant company, was personally interested in the transaction on both sides being an owner of some of the Alton stock which was sold to defendant; that said Edwin Hawley individually received a bonus or commission of $193,000.00 in cash for his services in procuring the defendant to purchase said stock, and that the bonds were fraudulently issued.

There was no prayer for process against the Rock Island Company. It was alleged "that upon the beginning of the taking of said testimony before said special master, said The Chicago, Rock Island & Pacific Railway Company, under the authority of the order entered by this court on the 22nd day of October, 1914, to which order reference is hereby made, intervened and appeared by its counsel and entered its appearance herein, and from time to time, since said date, has, as the owner and holder of certain of said A bonds and as the owner and holder of all of said B bonds, by virtue of said order last mentioned, and of the said answer and cross bill of said Bondholders' Committee participated in the taking of testimony and in making objections and taking exceptions to testimony offered, and in making stipulations as to matters occurring during said hearing; that thereby said The Chicago, Rock Island & Pacific Railway Company has entered

its appearance in this suit, and has become a party hereto, and has rendered itself subject to the jurisdiction of this court herein."

The prayer was as follows:

"Wherefore this defendant prays:

(a) That the answer and cross bill of Edwin G. Merrill, et al., as a Bondholders' Committee may be dismissed; that the alleged bonds described in said answer and cross bill be declared to be null and void and that said Edwin G. Merrill, et al., as a Bondholders' Committee and each and all of the owners and holders of said bonds be forever enjoined from enforcing or attempting to enforce any of said bonds or any of said interest coupons thereof against this defendant or its property and assets; and said Edwin G. Merrill, et al., as a Bondholders' Committee, The Chicago, Rock Island & Pacific Railway Company and each and all other owners and holders of said bonds be ordered to cancel and surrender said bonds and the interest coupons thereof and each and all of the same to this defendant.

(b) That in the event any of said A bonds are found to be valid obligations of this defendant, and that the holders thereof are good faith owners of same, that the court order, decree and adjudge that this defendant shall have and recover of The Chicago, Rock Island & Pacific Railway Company any and all sums which it may be by said order and decree required to pay to

such good faith bondholders if any, together with interest thereon.

(c) That the court take an accounting of the amount which this defendant has paid for and on account of the interest upon said A and B bonds in excess of the amount which it has received as dividends upon said Alton stock, and that it may have and recover from said The Chicago, Rock Island & Pacific Railway Company such excess amount with interest thereon.

(d) That The Chicago, Rock Island & Pacific Railway Company may be held to be a party to this suit and required to answer hereto within the time required by law, or failing so to do that the allegations hereof shall be taken as confessed by said The Chicago, Rock Island & Pacific Railway Company.

(e) This defendant further prays for all relief to which it may be entitled by reason of the premises."

The pleading and other pleadings not now material, were filed over objection of Central Trust Company, Trustee, and Edwin G. Merrill, et al., by an order of March 1, 1918. The solicitor for Creith, for the railroad and others, made proof of service of copies upon "The Chicago, Rock Island & Pacific Railway Company, Lawrence Maxwell, Solicitor," and on March 11, 1918, an order was entered, providing

> "it is accordingly ordered that the Chicago, Rock Island & Pacific Railway Co., which, the court finds has heretofore entered its appearance

as a party to this suit, be accorded and allowed ten days from the date of the entry hereof within which it is required to reply to the said cross-bill of Toledo, St. Louis & Western Railroad Company, and to such, if any, of the other above enumerated pleadings as said Chicago, Rock Island & Pacific Railway Company may desire to reply, and in default of such reply a decree pro confesso against the Chicago, Rock Island & Pacific Railway Company may be entered on said cross-bill of Toledo, St. Louis & Western Railway Company, and upon the other above enumerated pleadings as in default, etc."

The Chicago, Rock Island & Pacific Railway Company filed the following motion to set aside said order:

"The Chicago, Rock Island & Pacific Railway Company, appearing solely for the purpose of this motion and not intending to submit itself to the jurisdiction of this court as a party to this suit, moves the court to set aside its finding in the order entered herein on March 11, 1918, that the Chicago, Rock Island & Pacific Railway Company has heretofore entered its appearance as a party to this suit and its order that in default of a reply to the cross-bill of the Toledo, St. Louis & Western Railroad Company and to the other enumerated pleadings, a decree pro confesso may be entered against it on said cross-bill and upon the other enumerated pleadings as in default; on the ground that the court was without jurisdiction to make said order, or over this defendant as a party to said cross-bill."

On November 13, 1919, the court filed an opinion, copy of which is hereto attached, and entered an order

giving the Rock Island Company twenty days within which to plead to the cross bill of the Toledo, St. Louis & Western Railroad Company and that in default thereof a decree pro confesso against The Chicago, Rock Island & Pacific Railway Company may be entered upon said cross bill of the Toledo, St. Louis & Western Railroad Company. Within twenty days to-wit, on December 3, 1919, The Chicago, Rock Island & Pacific Railway Company filed the following motion:

> "The Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing under the laws of Illinois and Iowa, having its office and principal place of business in Chicago, not intending to waive, but insisting upon and renewing its claim that it is not a party to this suit and has not entered its appearance as a party and that the court is without jurisdiction over it as a defendant to the so-called cross bill of the Toledo, St. Louis & Western Railroad Company, filed herein on March 1, 1918, or at all, especially in respect of the pretended cause of action therein set up for the recovery of moneys from it, moves to dismiss so much of said cross bill as seeks to recover moneys from The Chicago, Rock Island & Pacific Railway Co. upon the ground that it is not suable in this suit or in this District upon said pretended cause of action, not being an inhabitant of the District or of the State of Ohio, and neither it nor the Cross Complainant being a resident of the District or State.
>
> This motion is filed under protest in obedi-

ence to the orders of the court, entered March 11, 1918, and November 13, 1919, to avoid a judgment by default.

The Chicago, Rock Island & Pacific Railway Company has a good defense to said pretended cause of action of the Toledo, St. Louis & Western Railroad Company, and proposes if this motion is overruled, to plead without delay to the merits thereof, which it cannot do as a part of this motion without prejudicing the jurisdictional objections raised by the motion."

On April 15, 1920, the court overruled the motion in an opinion, copy of which is attached hereto, and entered the following order:

"This cause coming on to be heard upon the motion of the defendant, The Chicago, Rock Island & Pacific Railway Company, filed herein December 3, 1919, to dismiss so much of the cross bill of the Toledo, St. Louis & Western Railroad Company as seeks to recover moneys from The Chicago, Rock Island & Pacific Railway Company, is heard and considered; and the court finds said motion not well taken and does overrule the same; to which the said defendant, The Chicago, Rock Island & Pacific Railway Company is allowed an exception, which is accordingly entered in its behalf.

The defendant, The Chicago, Rock Island & Pacific Railway Company is given until May 8, 1920, to answer the cross bill against it of the Toledo, St. Louis & Western Railroad Company.

John M. Killits, District Judge."

April 15, 1920.

Wherefore your petitioner, being without other adequate remedy, prays the court for a writ of prohibition directed to the District Court, commanding it to proceed no further against your petitioner upon said cross bill of Toledo, St. Louis & Western Railroad Company, or in the alternative for a writ of mandamus directing the court to vacate its orders in that behalf; and that an order be now entered by this court requiring said District Court, within a time to be fixed, to show cause why a writ of prohibition or of mandamus should not issue.

The Chicago, Rock Island & Pacific
Railway Company
[By] Lawrence Maxwell,
Its Attorney.

William L. Day,
Joseph S. Graydon,
Of Counsel.

State of Ohio, Hamilton County, ss:

Lawrence Maxwell, being first duly sworn, says that he is familiar with the records and proceedings in said case in Equity No. 112, in the District Court of the United States, Northern District of Ohio, Western Division, and that the facts alleged in the foregoing petition are true as he verily believes.

Lawrence Maxwell.

Sworn to before me and subscribed in my presence this 28th day of May, 1920.

Robert E. Freer,
Notary Public, Hamilton County, O.

In the United States District Court, Northern District of Ohio, Western Division.

No. 112. In Equity.

Entry.

Horatio C. Creith, Plaintiff,

vs.

Toledo, St. Louis & Western Railroad Company, Defendant.

This 5th day of March, 1917, came on for hearing the motion of Jules S. Bache, et al., as a Stockholders' Protective Committee for an order appointing a Special Master herein, and upon considering said motion and the evidence offered in support of same, the court finds upon such evidence that a showing has been made of an exceptional condition herein requiring the appointment of a Special Master with the powers and duties hereinafter stated.

It is therefore ordered by the court that Guy W. Kinney be, and he is hereby appointed Special Master herein, with the following powers and duties, viz.:

1. Said Special Master shall take and report to the court, on or before July 15, 1917, evidence offered by any or all of the parties hereto upon the issues raised by the answer and cross bill of Edwin G. Merrill et al., as a Bondholders' Protective Committee, the answer of said Jules S. Bache et al., as a Stockholders' Committee to said answer and cross bill of said Edwin

G. Merrill et al., the answer of Horatio C. Creith to said answer and cross bill of said Edwin G. Merrill et al., the answer of the Western Union Telegraph Company to said answer and cross bill of said Edwin G. Merrill, et al., the cross bill of Central Trust Company of New York as Trustee, the answer of said Jules S. Bache et al., to said cross bill of said Central Trust Company of New York as Trustee, and the answer of the Western Union Telegraph to said cross bill of said Central Trust Company of New York as Trustee, the bill of intervention of the Western Union Telegraph Company, and also upon the bill of complaint of Horatio C. Creith, except in so far as the issues thereunder have been heretofore referred.

2. Said Special Master shall assign the times and places for the taking of evidence under this order, and shall give notice to the parties hereto, or their counsel, as to the particular hour and place he will begin to take testimony and said Master shall thereafter continue to take testimony from day to day, or adjourn the taking of testimony from time to time and from place to place, as said Master may order, notice of the time and place of such adjourned hearings to be given to the parties or their counsel, by said Master. Said Master is hereby authorized to take testimony at such places, either within or without the Northern District of Ohio, as said Master may deem necessary, proper and convenient.

3. Said Master shall himself, or by designation of

one or more competent persons, report stenographically, and transcribe in typewriting, the testimony of witnesses heard by said Master.

4. Said Special Master is hereby authorized to regulate the proceedings beforehand, and is given full power and authority to issue, or to have issued by the Clerk of the proper court, subpoenas for witnesses, to swear and examine witnesses, or have them examined in his presence, touching all issues raised by the pleadings mentioned in paragraph (1) one hereof, (subject to the exception therein stated), and he may require all books, vouchers and papers of every character, relevant to said issues, to be produced beforehand, and may issue or cause to be issued, subpoenas duces tecum.

5. For the purposes of determining whether he shall require answers to be given to the questions asked, and whether documentary evidence shall be produced and incorporated in his report, said Special Master shall have, and is hereby given, full power and authority to decide upon the competency, materiality and relevancy of testimony and evidence offered before him by any party hereto, and to require the giving or production of such evidence in accordance with his judgment as to whether same is competent, material and relevant to the issues in respect to which said Special Master is hereby ordered to take and report evidence, and said Special Master is hereby given full power and authority to enforce his rulings on such

matters in accordance with the equity rules and laws of the United States; all such rulings, however, shall be, and are hereby made subject to review by this court, and power to review, and if erroneous to correct, any and all rulings by said Master is hereby expressly reserved by the court.

6. Said Special Master shall, on or before July 15, 1917, report to this court a full and complete transcript of all testimony taken before him, attaching thereto all exhibits, or copies of all exhibits, offered or received in evidence on the hearings before said Master, and in order that all questions may be before the court on the coming in of the Master's report, said Master is directed to take answers to all questions, whether objected to or not, noting all objections, the reasons assigned therefor, the rulings of the Master on such objections and the exceptions to his rulings, on the record and generally to require answers to all questions unless it is clear that the proffered evidence is not pertinent or germane to the matter of the reference in any respect.

7. The motion of said Jules S. Bache et al., for reference, otherwise than is herein granted, is hereby overruled, without prejudice, however, to the right of said Jules S. Bache, et al., to renew same hereafter.

(Signed) John M. Killits.

In the District Court of the United States, for the Northern District of Ohio, Western Division.

Equity No. 112.

Horatio C. Creith, Plaintiff,

vs.

The Toledo, St. Louis & Western Railroad Company, Defendant.

Memorandum Opinion on Motion to Vacate Order of March 11, 1918.

Killits, J:

By various answers and admendments to previous pleadings, and which were permitted by us to be filed in this court, March 1, 1918, the complainant, the defendant, The Toledo, St. Louis & Western Railroad Company, the defendant, The Western Union Telegraph Company, and the defendants, Jules S. Bache, et al., as a Stockholders' Protective Committee, demanded the bringing into this case as an additional defendant, of The Chicago, Rock Island & Pacific Railway Company for reasons in the several pleadings set forth. Service being had without the district upon counsel already of record in the case for The Chicago, Rock Island & Pacific Railway Company, upon proof thereof and a consideration of the record made, the court found that the Railway company had entered its appearance as a party to the suit. It was given ten days within which to reply to the several pleadings filed March 1, as above stated, or suffer a decree pro

confesso. Subsequently and in due time a motion was made by The Chicago, Rock Island & Pacific Railway Company, attempting to appear specially for that purpose, to vacate the findings and order of March 11, 1918. Without giving any consideration at this time to the insistence that the terms of this motion were such as to enter the general appearance of the railway company in this case, it is sufficient to say that we consider the motion not well taken. It appears from the record that in the taking of testimony on the original lines, there came a time when, clearly, the principals in the several trusts represented in this case by trustees as parties were separated into classifications whose interests in the final outcome of the required different and somewhat antagonistic treatments, wherefore The Central Trust Company and the Bondholders' Protective Committee, who shared the responsibility of protecting the bonds and the holders thereof, became charged with duties which promised to involve them in inconsistent attitude towards the contentions of the parties to this case who attempted to bring in the railway company. Should the court be compelled to find in the final submission of this case that The Chicago, Rock Island & Pacific Railway Company bore responsibility for the alleged frauds perpetrated in the issuing of the bonds in controversy here, there would necessarily arise an adverse interest in favor of the bona fide holders of such bonds against the mala fide holders thereof, when this possibility loomed on the

horizon in the taking of testimony, its significance seems to have been recognized by the Chicago, Rock Island & Pacific Railway Company, whereupon Mr. Lawrence Maxwell, whose relation as counsel to the company or his power to represent the railway company in the litigation seems not to be in dispute—entered into the taking of testimony. Without going into detail, the court finds that with great clearness he signified his position before the master as one there to protect the special interests in this litigation of the railway company. Assuming, only for the purposes of full consideration of this motion, that the contentions of the parties to the case attacking the bonds are correct, a full and equitable determination of their rights as well as the rights of the bona fide holders of these bonds could not be reached by the court unless The Chicago, Rock Island & Pacific Railway Company were made a party to the case.

We are clear, therefore, not only that the railway company in question has caused itself to be so represented in the taking of testimony in this case as to have made itself a party to the record, but that it should be held here as a party, subject to any order which the court may legitmately make herein.

For the time being it seems unnecessary to analyze the authorities upon this subject. Counsel have the benefits of the exhaustive briefs of their respective opponents.

John M. Killits, District Judge.

November 3, 1919.

In the District Court of the United States, for the Northern District of Ohio, Western Division.

In Equity No. 112.

Horatio C. Creith, Plaintiff,

vs.

The Toledo, St. Louis & Western Railroad Company, Defendant.

Memorandum.

Killits, J:

The motion of The Chicago, Rock Island & Pacific Railway Company to dismiss that part of the cross bill of The Toledo, St. Louis & Western Railroad Company which seeks to recover moneys from The Chicago, Rock Island & Pacific Railway Company we find not well taken upon the authority of Williamson vs. Collins, 243 Fed. 835; Caflisch vs. Humble, 251 Fed. 1; Howard vs. Leete, 257 Fed. 918, and other cases of similar character.

April 15, 1920.

SUPREME COURT OF THE UNITED STATES.

October Term, 1919.

No. —.

IN RE. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, PETITIONER.

BRIEF FOR PETITIONER

Statement of the Case

The petitioner, which for brevity we shall call the Rock Island Company, a citizen of Illinois, with its principal office in Chicago, has been sued in the United States District Court at Toledo, for the recovery of money, by Toledo, St. Louis & Western Railroad Company, a citizen of Indiana, hereinafter called the Toledo Company. The court has not acquired jurisdiction of the person of the Rock Island Company, and cannot acquire such jurisdiction, since the company cannot be found within the district, nor is it suable therein by the Toledo Company for the recovery of money, not being an inhabitant of the district, and neither company being a resident thereof. Judicial Code, Sec. 51.

These objections to the assumption of jurisdiction by the District Court have been properly presented to

it (11, 12) but overruled (19, 22) and the Company has been ordered to defend or suffer judgment by default. It has no adequate remedy except to apply, as it does now, to this court for relief. "An appeal or writ of error, at the end of long and expensive proceedings, which must go for naught if the District Court is without jurisdiction, is not an adequate remedy." 213 U. S. at p. 467.

The District Court did not acquire jurisdiction of the person of the Rock Island Company upon the cause of action set up in the cross bill of the Toledo Company.

It is an action to recover money from the Rock Island Company, to wit., all sums that the Toledo Company may be required to pay to *bona fide* holders of its bonds, if there are any (which the pleading does not admit, but on the contrary denies), and all interest which it has paid on A & B bonds in excess of dividends received on the Alton stock (9, 10). There was a prayer that the Rock Island Company "may be held to be a party to this suit and required to answer hereto within the time required by law" (10), but no process was asked or issued. It was thought sufficient by the Toledo Company to allege that the Rock Island Company had "entered its appearance in this suit, and has become a party hereto, and has rendered itself subject to the jurisdiction of this court herein" (8, 9), as if that, if it were true, would overcome the objection that the Rock Island Company was not suable upon such a cause of action in a district whereof it was not an inhabitant.

The learned District Judge in the opinion filed by him (19) referred to the pleading as one which "demanded the bringing into this case as an *additional defendant,* of the Chicago, Rock Island & Pacific Railway Company". If that be true, issue and service of process was necessary. The pleading was not a cross-bill to any pleading of the Rock Island Company. That company never filed any pleading, and had not been named as a party in any pleading.

The Rock Island Company had neither occasion nor right to intervene, having by the protective agreement of August 3, 1914, assigned and vested in the Merrill Committee "complete and absolute title to the said bonds and coupons with the same effect as if the Committee were the absolute owners thereof" and "expressly empowered the Committee to sue on said bonds and coupons in their own names." This the Committee did in an answer and cross-bill filed by leave of the court August, 1915, being one of the pleadings which by the order of March 5, 1917, appointing a special master, were referred to him to take testimony upon the issues made up by the pleadings theretofore filed. His power was limited to the taking of testimony. He had none to permit pleadings to be amended, to admit new parties, or to entertain a petition for leave to intervene, if such a petition had been offered. These suggestions would seem to be a sufficient answer to the claim that Mr. Maxwell by his participation in the taking of testimony before the special master "entered the appearance" of the Rock Island Company. That he could not have done, since the Rock Island Company was not then a party to the suit. What he did was to appear as counsel for the Merrill Committee, who were

parties, in the interest of the Rock Island Company, and this was formally noted at the beginning of the taking of testimony on April 2, 1917, as follows:

> "The Central Trust Co. of New York, Joline, Larkin and Rathbone, Esqs. (by Henry B. Poor, Esq, of counsel). Edwin G. Merrill, et al., Bondholders' Committee by Spooner & Cotton, Esqs. (by T. M. Gordon, Esq. of counsel).
>
> Lawrence Maxwell, Esq., and J. P. Cotton, Esq. appearing for the Bondholders' Committee, Mr. Maxwell appearing to represent the interest of the Rock Island Company and Mr. Cotton representing the "A" bonds."

The only basis for the claim that the District Court has jurisdiction of the person of the Rock Island Company, is that Mr. Maxwell entered its appearance by appearing as counsel for the Bondholders' Committee.

But if we assume that the District Court could exercise so dangerous a power as to find that it had acquired jurisdiction of a person for whom no legal process had been asked, on whom none had been served, and against whom no relief had been prayed by any party to the suit, it would not follow that the court's jurisdiction extended to causes of action subsequently asserted for the first time.

In *Ex parte Indiana Transportation Company*, 244 U. S. 456, the Court held that "appearance in answer to a citation issued upon a libel *in personam* does not empower the court to introduce new claims of new claimants into the suit without service on the defendant and against his will." The case being in admiralty prohibition was the appropriate writ, and the Court granted it, on the ground that "the District

Court attempted to exceed its jurisdiction." Mr. Justice Holmes, delivering the opinion, quoted as follows from a New Jersey case cited in *Reynolds* v. *Stockton*, 140 U. S. 254, 256:

> "Persons by becoming suitors do not place themselves for all purposes under the control of the court."

In *Merriam* v. *Saalfield*, 241 U. S. 22, it appears, as shown by the head-notes, that the court held:

> "One not a defendant, but who is estopped by the decree because of having exercised control of the defense and who is not a resident of the district, cannot be brought into the action by the filing of a supplemental bill and mere notice to, and substituted service on, him without service of original process within the district.
>
> "Such a supplemental bill is not dependent on or ancillary to the original suit, in the sense that jurisdiction of it follows jurisdiction of the original cause."

In *Merriam* v. *Saalfield*, 241 U. S. 22, it is decided that a direct appeal to this court under section 238, Judicial Code, is not confined to cases in which the jurisdiction of the district court as a federal court is involved, but extends to cases involving its jurisdiction over the person. The jurisdiction of the District Court in the present case is denied on both grounds. The rule declared in *In re Massachusetts*, 197 U. S. 482, and *In re Glaser*, 198 U. S. 171, that this Court cannot grant prohibition or mandamus, in cases over which it has no original or appellate jurisdiction, does not therefore apply.

In *Ex parte Bradley*, 7 Wall. 364, 377, the Court allowed a writ of mandamus directed to the Supreme Court of the District of Columbia upon the ground "that the court below had no jurisdiction to disbar the relator for a contempt committed before another court. . . . No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case."

In *In re Metropolitan Trust Company*, 218 U. S. 312, a writ of mandamus was awarded as "the appropriate remedy," where the Circuit Court had vacated a decree "after the term had expired" and therefore without jurisdiction.

We respectfully pray that leave be granted to file the petition for a writ of prohibition or mandamus, and that a provisional rule be entered to show cause.

LAWRENCE MAXWELL,
WILLIAM L. DAY,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1920

Original No. 24

Ex Parte: In the Matter of the Chicago, Rock Island and Pacific Railway Company, Petitioner.

REPLY BRIEF.

Lawrence Maxwell,
William L. Day,
Joseph S. Graydon,
Counsel for Petitioner.

THE BARCLAY PRINTING COMPANY, 1018-1020 Elm Street, Cincinnati, O.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1920

Original No. 24

Ex Parte: In the Matter of the Chicago, Rock Island and Pacific Railway Company, Petitioner.

REPLY BRIEF.

We attach copies of the following orders and motion referred to in the return, but not fully set out therein, to-wit: order of March 1, 1918 (p. 9), and the motion referred to in said order (p. 10); order of March 11, 1918 (p. 11); order of November 13, 1919 (p. 13); so much of the order of October 22, 1914, appointing a receiver as relates to presentation of claims of creditors (p. 14).

The notice set out at p. 15 of the return was addressed as therein alleged; it was signed "Tracy, Chapman & Welles, Solicitors for parties filing the above pleadings."

The answer of the Rock Island Company to the cross bill filed as alleged at p. 20 of the return, commences as follows:

"The Chicago, Rock Island & Pacific Railway Company, a corporation organized and existing under the laws of Illinois and Iowa, having its office and princi-

pal place of business in Chicago, Illinois, not intending to waive, but insisting upon and renewing its claims, that it is not a party to this suit and has not entered its appearance as a party, and that the court is without jurisdiction over it as a defendant to the so-called cross bill of the Toledo, St. Louis & Western Railroad Company, filed herein on March 1, 1918, or at all, and especially in respect of the pretended cause of action therein set up for the recovery of moneys from it, and that it is not suable in this suit upon said pretended cause of action, neither it nor the cross complainant being a resident or inhabitant of this District; files this answer to said cross bill in pursuance of the orders of the court and under protest in order to avoid judgment against it by default."

I.

For brevity we call the Chicago, Rock Island & Pacific Railway Company the Rock Island Company, and the Toledo, St. Louis & Western Railroad Company the Toledo Company.

Whatever hearing was had of the motion of the Toledo Company, for leave to file a cross bill against the Rock Island Company, was ex parte. It is not alleged that the Rock Island Company had notice of the hearing or that it was present. The order that was entered (post p. 9) recites who were present. The motion (p. 10) does not even suggest that the cross bill proposed to be filed was a cross bill against the

Rock Island Company, nor does the order that was entered indicate that any pleading allowed to be filed was a cross bill against the Rock Island Company.

The finding in the order of March 11, 1918 (post p. 12), that the Rock Island Company "has heretofore entered its appearance as a party to this suit" is ex parte. It is not alleged in the return that the Rock Island Company had notice of the hearing, or that it was present. The so-called "notice" mentioned in the order, and set out at p. 15 of the return, was an unofficial ex post facto notice, received at Cincinnati on March 9, 1918, from counsel for the Toledo Company, that seven pleadings therein mentioned had been filed by leave of court on March 1, 1918. It is not suggested in the "notice" that any pleading was a cross bill against the Rock Island Company, or that further orders would be applied for, or that a copy of the order was enclosed.

II.

The allegation on p. 14 of the return that "evidence was introduced" on the hearing of the motion for leave to file the cross bill, is not in accord with the order that was entered (post p. 9).

It is not alleged (p. 16 of return) that evidence was introduced on March 11, 1918, but only that "the court considered further the evidence which had been introduced," evidently referring to March 1, 1918. This is not in accord with the order that was entered

(post p. 11), which recites only that proof was made of service on Mr. Maxwell of the so-called "notice."

The allegation on p. 18 of the return, that the motion appearing on p. 11 of the petition was heard on evidence, is not indicated in the order that was entered (post p. 13), nor in the opinion that was filed (p. 19 of the petition). That opinion clearly shows that the ground of decision was that the Rock Island Company had "caused itself to be so represented in the taking of testimony in this case as to have made itself a party to the record."

In re Veler in the Circuit Court of Appeals for the Sixth circuit, 249Fed.633, is a case in which the District Court had appointed a receiver, and sometime after the receivership was closed had on its own motion instituted an inquiry in open court, summoned witnesses and announced the conclusion that there had been no jurisdiction, and that the District Judge had been "grossly misled into the appointment of a receiver." He thereupon found that the original petitioning creditors were liable for the debts of the receiver and costs of the receivership. The decision of the Circuit Court of Appeals reversing the judgment is shown at page 644, and is indicated in the thirteenth syllabus:

> "In view of the imperfections of the human memory, a statement or certificate of the District Judge with respect to the appointment of a receiver, which it was asserted was secured through imposition on the court, does not, where made in a summary proceeding in which no

issues to determine the liability of the petitioning creditors were framed, import verity, as would a record of judicial proceedings required to be certified by the court."

III.

It is a fundamental rule that in order to obtain jurisdiction

> "service of process or the prescribed legal or statutory notice is always a prerequisite to jurisdiction over either the person or property, and this statutory mode of service or of giving notice, must be followed, including requirements as to time, or the return. Nor does a person's knowledge of the existence of an action, no matter how clearly brought home to him, supply the want of compliance with the statutory or legal requirements, and so even though the party is in the court's presence unless he is brought there by legal means. Service of process out of the territorial jurisdiction of the court from which it issues, at common law is a nullity, for process of court has no force outside of its jurisdiction" (11 Cyc. 671, title 'Courts' citing numerous cases).

The fundamental principles are set forth in the opinion of Mr. Justice Field in the leading case of Pennoyer vs. Neff, 95 U. S. 714.

In Pacific Railroad vs. Missouri Pacific Railway Co., 1 McCrary 647 (also reported at 3 Fed. 772), the court had entered a decree of foreclosure and sale on a mortgage of the Missouri Pacific Railroad. Thereafter

a bill was filed in the same suit to set aside the sale, making purchasers at the sale, and others who were not parties to the original suit, parties defendant. Subpoenaes were issued and served outside the jurisdiction and on a motion to vacate such service Mr. Justice Miller, upon consideration of sections 738 and 739 of the Revised Statutes, granted the motion, saying:

> "The argument, by which it is endeavored to support the service of process upon persons without the district, is that the present suit is one that is auxiliary to the former suit in which the decree of foreclosure was had; that it is so far merely a continuation of that suit; and that it is not a new and original suit in the sense that requires process to be restricted to those who have the requisite citizenship in ordinary suits in the federal courts. It may be conceded for the purposes of this motion that it is to a certain extent auxiliary to the original foreclosure suit, and that proceedings to set aside that decree, and to set aside also the sale of the railroad under that decree, can only be instituted in the circuit court of the United States in which that decree was rendered. But it also partakes so far of the nature of an original suit that the parties who are here contesting service of this process cannot be brought before the court by anything short of a subpoena in chancery; and cannot be compelled to answer and respond to the allegations of the present bill in any other mode than in the mode usually adopted in original chancery bills."

The rule was enforced and substituted service on bills filed as ancillary but making new parties, set aside, in Rubber Co. vs. Goodyear, 9 Wall. 807, 810, and Shainwald vs. Davids, 69 Fed. 701. See also Manning vs. Berdan, 132 Fed. 382, and Smith vs. Woolfolk, 115 U. S. 143.

In in re Cooper, 143 U. S. 472, cited at p. 31 of respondent's brief, it clearly appears at p. 478 that the defendant was duly served with process, filed a demurrer to the libel by leave of court, and upon its being overruled, filed an answer and proceeded to trial.

Equity rules 30 and 31, relied upon by respondent, are equally irrelevant. They provide for a decree pro confesso, in default of reply to a counter-claim or set-off against the plaintiff set up by the defendant in his answer to the bill.

IV.

The decision of District Judge Westenhaver in VanKannel Revolving Door Co. vs. Winton Hotel Co. 263 Fed. 988, is indicated by the fourth syllabus:

> "A corporation, employing counsel appearing for defendant in a patent infringement suit, and conducting the defense at its own cost and expense, is a privy to any judgment rendered, and bound thereby, but was not required to become a party to the record."

The decision of the Circuit Court of Appeals, Third Circuit, in Bergdoll vs. Harrigan, 263 Fed. 279, is indicated by the third syllabus:

"Appearance of a stockholder of a bankrupt corporation to contest a petition by the trustee asking that an assessment be made on all stock not fully paid for held not to confer jurisdiction on the bankruptcy court to adjudicate his personal liability for such an assessment."

The above cases but apply the rule involved in Merriam vs. Saalfield, 241 U. S. 22, and other cases cited at p. 5 of our original brief.

It is shown by cases in this court, cited at pages 5 and 6 of our original brief, and is conceded at pages 7 and 9 of respondent's brief, that a writ of mandamus is the appropriate remedy if petitioner is entitled to relief.

We submit that the return shows no cause, and that a writ of mandamus should be awarded as prayed

Lawrence Maxwell,
William L. Day,
Joseph S. Graydon,
Counsel for Petitioner.

APPENDIX.

Order Entered March 1, 1918.

This day came Thos. H. Tracy and George D. Welles of Tracy, Chapman & Welles, of counsel for the parties filing the motions hereinafter described, E. J. Marshall of Marshall & Fraser, of counsel for Edwin G. Merrill, et al., as a bondholders' committee, and William B. Stewart, of Hoyt, Dustin, Kelley, McKechan & Andrews of counsel for Central Trust Company of New York as Trustee, and thereupon came on for hearing the respetive motions of the Toledo, St. Louis & Western Railroad Company for leave to file an answer to the cross bill of Central Trust Company of New York as Trustee, and of Toledo, St. Louis & Western Railroad Company for leave to file an answer and cross bill to the answer and cross bill of Edwin G. Merrill, et al., as a bondholders' committee, and the motions of Jules S. Bache, et al., as a stockholders' committee for leave to file an amendment to its answer to the cross bill of Central Trust Company of New York as Trustee, and of Jules S. Bache, et al., as a stockholders' committee for leave to file an amendment to its answer to the answer and cross bill of Edwin G. Merrill, et al., as a bondholders' committee, and its cross bill and the motions of The Western Union Telegraph Company for leave to file an amendment to its answer to the cross bill of Central Trust Co. of New York as Trustee, and of The Western Union Telegraph Co. for leave to file an amendment to its answer to the answer and cross bill

of Edwin G. Merrill, et al., as a bondholders' committee, and the motion of Horatio C. Creith to file an amendment to the bill of complaint, and said motions, together with the pleadings therein referred to were submitted to the court, and the court being fully advised in the premises finds that said motions and each of them should be, and the same are hereby granted, and the pleadings therein referred to are accordingly allowed to be filed; to the foregoing order Central Trust Company of New York as Trustee, and Edwin G. Merrill, et al., as a bondholders' committee thereupon, by their counsel, duly excepted.

John M. Killits,
Judge.

Motion referred to in Order of March 1, 1918.

Motion of Toledo, St. Louis & Western Railroad Company for Leave to File an Answer to the Answer and Cross Bill of Edwin G. Merrill, et al.

Now comes the Toledo, St. Louis & Western Railroad Company and moves the court for leave to file an answer herein to the answer and cross bill of Edwin G. Merrill, et al., and its cross bill, and which answer and cross bill it will tender upon the hearing hereof.

Tracy, Chapman & Welles,
Solicitors for Toledo, St. Louis
& Western Railroad Company.

Order of March 11, 1918.

On this 11th day of March, 1918, came Thos. H. Tracy, of Tracy, Chapman & Welles, of solicitors in this suit for Horatio C. Creith, Jules S. Bache, et al., as a stockholders' committee, The Western Union Telegraph Company, and Toledo, St. Louis & Western Railroad Company, and filed in this suit, copy of notice to Chicago, Rock Island & Pacific Railway Company, Lawrence Maxwell, Solicitor, and made due proof that the original of said notice, together with duly certified copies of amendment to bill of complaint, amendment to answer of Jules S. Bache, et al., to the answer and cross bill of Edwin G. Merrill, et al., amendment to the answer of Jules S. Bache, et al., to the cross bill of Central Trust Company of New York as Trustee, amendment to the answer of The Western Union Telegraph Company to the answer and cross bill of Edwin G. Merrill, et al., amendment to the answer of The Western Union Telegraph Company to the cross bill of Central Trust Company of New York as Trustee, answer of Toledo, St. Louis & Western Railroad Company to the answer and cross bill of Edwin G. Merrill, et al., and cross bill of Toledo, St. Louis & Western Railroad Company, and answer of Toledo, St. Louis & Western Railroad Company to the cross bill of Central Trust Company of New York, as Trustee, the originals of which pleadings were filed in this suit on the 1st day of March, 1918, were duly delivered to and served upon Lawrence Maxwell, Solicitor for Chicago, Rock

Island & Pacific Railway Company in this suit on the 9th day of March, 1918, and;

It is accordingly ordered that the Chicago, Rock Island & Pacific Railway Company, which, the court finds, has heretofore entered its appearance as a party to this suit, be accorded and allowed ten days from the date of the entry hereof within which it is required to reply to the said cross bill of Toledo, St. Louis & Western Railroad Company, and to such, if any, of the other above enumerated pleadings as said Chicago, Rock Island & Pacific Railway Company may desire to reply, and in default of such reply a decree pro confesso against The Chicago, Rock Island & Pacific Railway Company may be entered on said cross bill of Toledo, St. Louis & Western Railway Company, and upon the other above enumerated pleadings as in default, etc., and the clerk of this court is hereby directed to forthwith mail a duly certified copy hereof to Lawrence Maxwell, Esq., Solicitor for Chicago, Rock Island & Pacific Railway Company, No. 2208 Union Central Building, Cincinnati, Ohio.

John M. Killits, Judge.

Order Entered November 13, 1919.

This cause came on to be heard upon the motion of the Chicago, Rock Island & Pacific Railway Company filed herein on March 20, 1918, to set aside the finding and order of the court entered March 11, 1918; on consideration whereof said motion is overruled, to which the Chicago, Rock Island & Pacific Railway Company excepts, and said Chicago, Rock Island & Pacific Railway Company, within 20 days from the date of the entry hereof, is required to plead to said cross bill of Toledo, St. Louis & Western Railroad Company and to such if any of the other pleadings enumerated in said order of March 11, 1918, to-wit: The amendment to the bill of complaint; The amendment to the answer of The Western Union Telegraph Company to the cross bill of Central Trust Company of New York, as Trustee; The amendment to the answer of Jules S. Bache, et al., to the cross bill of Central Trust Company of New York, Trustee; The amendment to the answer of Jules S. Bache, et al., to the answer and cross bill of Edwin G. Morrill, et al.; The answer of Toledo, St. Louis & Western Railroad Company to the answer and cross bill of Edwin G. Merrill, et al., and cross bill of Toledo, St. Louis & Western Railroad Company, the answer of Toledo, St. Louis & Western R. R. Co. to the cross bill of Central Trust Company of New York, as Trustee; as said Chicago, Rock Island & Pacific Railway Company may desire to plead to, and in default thereof a decree pro confesso against Chicago, Rock Island & Pacific

Railway Company may be entered upon said cross bill of said Toledo, St. Louis & Western Railroad Company and upon the other above enumerated pleadings as in default. The Chicago, Rock Island & Pacific Railway Company excepts to said order upon the grounds that the court is without jurisdiction to make the same or to require it to plead to said pleadings or any of them, and because it is not a resident of the state of Ohio.

Provisions of Order of October 22, 1914, appointing receiver, relating to claims of creditors.

"Said receiver shall publish notice to the creditors of the defendant that said creditors shall, within sixty (60) days from the first publication of said notice, present their respective claims to him duly verified, or that they file herein a bill of intervention, and said master shall hear and receive such evidence as may be offered for and against the validity of any and all such claims and interventions, and shall determine and submit to the court his conclusions thereon. The receiver, the defendant, or any creditor or stockholder thereof, shall be permitted to plead to and contest the amount, validity and priority of any and all such claims. The receiver shall cause said notice to be published in a daily newspaper, published and of general circulation in each of the following cities, viz: the city of Toledo, Ohio; the city of Frankfort, Indiana; the city of St. Louis, Missouri; the city of Springfield, Illinois, and

the city of New York, New York. Such publication shall be made in each of said newspapers on each weekday for three successive weeks, and the receiver shall file herein due proof of such publications; and all creditors of the defendant, excepting those hereinafter named, failing to file with said receiver duly verified copies of their respective claims or bills of intervention herein, setting up their respective claims within sixty (60) days from the date of the first publication of such notice, shall be barred, and such creditors so failing to file verified copies of their respective claims or bills of intervention setting forth their respective claims, within the time aforesaid, shall not be permitted or allowed to participate or receive any payments upon their respective claims, either from the income of the property of the defendant, or from the proceeds of the sale thereof.

It is further ordered that the foregoing provisions of this order as to filing verified copies of claims or bills of intervention thereon shall not apply to creditors holding claims upon which the receiver is hereinbefore ordered to pay the interest, and creditors whose claims have arisen on account of services, labor, material or supplies furnished to the defendant, and which said accounts and claims shall, after investigation, be approved for payment by the receiver, and included within the list of creditors to be furnished by the receiver to the master, as hereinabove provided.

After the expiration of said sixty days, the master

shall proceed, without unnecessary delay, to hear and determine all questions as to the amount, validity, and priority of each and all of such claims, and shall make his report thereof to this court, in accordance with this order, within thirty (30) days after the expiration of said sixty (60) days, unless, upon application of the master to this court, further time is granted.

(Signed) John M. Killits, Judge.

Entered October 22, 1914."

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1920.

No. 24 Original.

In re Chicago, Rock Island & Pacific Railway Company, Petitioner.

MOTION OF PETITIONER FOR REHEARING.

On page 1 of the opinion the court, in stating the case, says; "The suit in which it is sought to proceed personally against the Rock Island is one brought by an Indiana stockholder of the Toledo, St. Louis & Western Railroad Company, an Ohio corporation, for the appointment of a receiver for that corporation." The fact, as distinctly alleged at page 1 of the petition for the writ, and not denied in the return, is that the plaintiff was a creditor (not a stockholder); that he was a citizen of Ohio (not of Indiana), and that the defendant was an Indiana corporation (not an Ohio corporation). The discrepancy may not be material or significant, except as suggesting that other and more important parts of the record may have been overlooked, or misunderstood.

But we beg leave to first call the attention of the Court to the authorities cited at page 2 of the opinion from which the Court deduces a "rule," tested by

which, it holds that "the case presented by the petition and the return does not entitle the Rock Island to this extraordinary remedy."

Ex parte Rice, 155 U. S. 396, the first of the cases, is cited to the proposition that "if the lower court is clearly without jurisdiction the writ will ordinarily be granted to one who at the outset objected to the jurisdiction and who has reserved his rights by appropriate procedure and has no other remedy;" but it seems to have no bearing on that proposition. It is a case in which this court refused leave to file a petition for a writ of prohibition or mandamus to review a judgment of a Circuit Court in a suit in which the jurisdiction of the Court over the parties or the subject matter was not involved. It was an attempt to review a judgment of a Circuit Court, not because the Court was without jurisdiction of the parties or the subject matter, but on the ground that its judgment was erroneous.

In in re Cooper, 143 U. S. 476, 482, next cited, it clearly appears at p. 478 that the defendant was duly served with process, filed a demurrer to the libel by leave of Court, and upon its being overruled, filed an answer and proceeded to trial.

Ex parte Tiffany, 252 U. S. 32, 37, was an attempt to review by writ of mandamus or prohibition a final judgment in a proceeding in a District Court of the United States, which the petitioner had himself instituted. No question of the jurisdiction of the lower Court over the subject matter or the parties was involved. Moreover, the judgment was one which could

be reviewed, as of right, by an appeal to the Circuit Court of Appeals.

The next case, Ex parte Harding, petitioner, 219 U. S. 363, is one of the many removal cases cited in the opinion. They were all attempts to review, by mandamus, judgments remanding, or refusing to remand, cases removed from a State Court. None involve any question as to the jurisdiction of the Circuit or District Court over the person of the parties, but only their jurisdiction of the subject matter; and that question was finally resolved and settled by applying to removal cases "the general rule that a Court, having jurisdiction over the subject-matter and the parties, is competent to decide questions arising as to its jurisdiction." We shall not notice further the removal cases cited in the opinion.

The "rule" which is supposed to bar the relief sought by the Rock Island is referred to again, at p. 5 of the opinion, as "the rule stated above," and additional cases are cited. None of them question the fundamental rule that the decisions of a Court which has not acquired jurisdiction of the person of a citizen, in the manner prescribed by law, is a nullity.

Jones vs. Andrews, 10 Wall. 327, cited at p. 5, to the proposition that "the District Court obviously had jurisdiction to determine in the first instance whether the Rock Island had entered a general appearance" was an appeal by Jones, the plaintiff below, from a decree dismissing his bill against Andrews "for want

of jurisdiction over the parties, as well as for want of equitable jurisdiction over the subject-matter of the bill." This Court reversed the decree and remanded the cause for further proceedings. There was no question as to the defendants having voluntarily appeared and moved to dismiss the bill upon the ground, among others, that "it contained no equity." Mr. Justice Bradley, delivering the opinion of the Court, said, at p. 432.

> "His moving to dismiss for want of equity was clearly a waiver; and he was properly required to answer the bill. After this the question of jurisdiction over the person was at an end, and the decree of the Circuit Court, dismissing the bill for want of jurisdiction, must be reversed."

Ex parte Gordon, 104 U. S. 515, was a case in admiralty in which the District Court had jurisdiction of the steamer and of the collision. This court refused a writ of prohibition.

Globe Refining Co. vs. Landa Cotton Oil Co., 190 U. S. 540, was a writ of error to a Circuit Court to reverse its judgment in an action for breach of contract. No question as to the jurisdiction of the Circuit Court over the person of the defendant was involved. He "pleaded that the damages had been claimed and magnified fraudulently for the purpose of giving the United States Circuit Court jurisdiction, when in truth they were less than two thousand dollars." The judge tried the question of jurisdiction before the hear-

ing on the merits, found that the plea was sustained and dismissed the action. This Court affirmed.

In re Pollitz, 206 U. S. 323, being a removal case, is covered by what we have said. The Circuit Court had jurisdiction of the person of both parties and of the subject-matter.

Ex parte Roe, 234 U. S. 70, cited at p. 6 of the opinion, belongs to the same category. Mr. Justice Van Devanter put it neatly, saying at p. 73: "The writ . . . does not lie to compel a reversal of a decision, either interlocutory or final, made in the exercise of a lawful jurisdiction, et caetera."

II.

Mr. Maxwell having entered his appearance specifically and definitely as counsel for the Bondholder's Committee the District Court was without power to decide that it was in fact an appearance for the Rock Island Company. Counsel know for whom they are authorized and intend to appear. Their statement is conclusive and being in writing cannot be varied.

The Rock Island Company respectfully prays for a rehearing.

Lawrence Maxwell,
William L. Day,
Joseph S. Graydon,
Counsel.

I certify that the foregoing petition is in my opinion well founded in point of law and that it is not interposed for delay.

Lawrence Maxwell,
Counsel.

IN THE

Supreme Court of the United States

October Term 1920

Original No. 24

IN RE THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Petitioner.

MOTION OF THE TOLEDO ST. LOUIS AND WESTERN RAILROAD COMPANY FOR LEAVE TO FILE BRIEF AND BE HEARD IN ORAL ARGUMENT.

THOS. H. TRACY,
GEO. D. WELLES,
Solicitors for Toledo, St. Louis and Western Railway Company.

IN THE

Supreme Court of the United States

October Term 1920

Original No. 24

IN RE THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Petitioner.

MOTION OF THE TOLEDO ST. LOUIS AND WESTERN RAIROAD COMPANY FOR LEAVE TO FILE BRIEF AND BE HEARD IN ORAL ARGUMENT.

Now comes The Toledo, St. Louis and Western Railroad Company by its solicitors Thomas H. Tracy and George D. Welles and respectfully moves for leave to file a brief in opposition to the petition herein, and by its said solicitors to be heard upon the argument of said cause as a party in interest in the event oral argument is heard in behalf of the petitioner, and in the alternative moves that its said solicitors be granted leave as *amici curiae* to file said brief. Thirty copies of said brief have been lodged with the clerk of this Court.

The ground for this motion is that the petition herein seeks to restrain further proceedings by the District Court of the United States for the Northern District of Ohio, Western Division, upon a cross-bill filed by the Toledo, St. Louis and Western Railroad Company seeking relief against the Chicago, Rock Island and Pacific Railway Company as a party to a suit pending in said court. Said Toledo, St. Louis and Western Railroad Company is vitally interested in sustaining the jurisdiction of said District Court over said Chicago, Rock Island and Pacific Railway Company in said suit as a party to said cross-bill.

By reason of the foregoing facts the Toledo, St. Louis and Western Railroad Company respectfully submits that it is a party in interest and prays leave through its solicitors to appear herein in defense of the jurisdiction of said District Court.

Notice of this motion has been served on opposing counsel.

Respectfully submitted,

THOS. H. TRACY,

GEO. D. WELLES,

Solicitors for Toledo, St. Louis and Western Railway Company.

OCTOBER 4, 1920.

IN THE

Supreme Court of the United States

October Term, 1920

Original No. 24

IN RE THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Petitioner.

RETURN OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION, TO THE RULE TO SHOW CAUSE AWARDED JUNE 7, 1920.

IN THE

Supreme Court of the United States

October Term, 1920

Original No. 24

IN RE THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Petitioner.

RETURN OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION, TO THE RULE TO SHOW CAUSE AWARDED JUNE 7, 1920.

The District Court of the United States for the Northern District of Ohio, Western Division, by the undersigned, John M. Killits, Judge of said court, respectfully makes the following return to the rule to show cause why a writ of prohibition or of mandamus

should not issue herein as prayed for in the petition herein filed June 7, 1920, viz:

A bill of complaint was filed in said court on October 22, 1914, by Horatio C. Creith, as alleged in the petition herein. An answer was filed to said bill as alleged and an order entered appointing a receiver, which contained among other provisions those summarized in the petition herein. Said order also contained a provision to the effect that "the receiver, the defendant, or any creditor or stockholder thereof shall be permitted to plead to and contest the amount, validity and priority of any and all such claims," i. e. claims against the Railroad Company.

Edwin G. Merrill, et al., on December 10, 1914, filed in said cause a petition, referred to in the petition herein, to which a copy of the bondholders' protective agreement was attached, and which contained among other allegations and prayers, those summarized in the petition herein. In said bondholders' agreement it was also provided, among other things that the depositors thereunder did "authorize and empower the said committee in the name of the depositors or in the name of the committee or in the name of any other person or persons, corporation or corporations, as the committee may deem proper, to institute, maintain, or take or cause to be instituted, maintained or taken, or to intervene in, or become a party to such actions or

proceedings in law, or in equity, or otherwise, * * * as will in the judgment of the committee tend to protect the interests of the depositors and to enforce the rights and the security provided by said bonds, coupons, trust agreement and pledge." Said bondholders' agreement contained a provision by which any bondholder who did not assent to any plan or agreement for reorganization of the Company might withdraw his bonds; and another provision by which the committee was empowered whenever it might deem proper, to terminate the agreement and return the bonds to the depositor; and a provision to the effect that "neither the committee nor the depositary assumes any responsibility or liability as to the genuineness, validity or regularity of any of the deposited bonds."

The plaintiff Creith, on December 28, 1914, answered the petition of Merrill, et al, as alleged in the petition herein.

On March 8, 1915, by leave of court, Merrill, et al, filed a so-called dependent bill on behalf of themselves and other owners of the gold bonds of 1917 as alleged in the petition herein.

Merrill et al, thereupon filed motions as alleged in the petition herein and the court made an order thereon as set forth in said petition, and thereupon Merrill, et al, filed an answer and cross bill on August

2, 1915. In said cross bill said committee set forth their alleged rights under the terms of said bondholders' agreement and alleged that they held thereunder bonds in the aggregate principal face amount of Ten Million Two Hundred and Ninety-five Thousand Dollars ($10,295,000.00), with certain unpaid interest coupons thereon, out of a total principal amount of bonds of $11,527,000.00. Said cross bill alleges, among other things (pp. 29 and 30), "These defendants, cross-complainants, and cross-plaintiffs file this counter-claim, cross-bill and cross-suit on behalf and for the benefit of themselves and of all other holders of said gold bonds of 1917 who may elect to become parties to this counterclaim, cross-bill and cross-suit * * *" The prayer of said cross-bill is in part, "That these defendants, cross-complainants, and cross-plaintiffs be awarded judgment against the defendant Railroad Company for the amount of said gold bonds of 1917 held or to be held by them, together with all interest accrued thereon, and for their costs; and that the court ascertain, establish and enforce by appropriate orders and decrees, the amounts so adjudged or found to be due to these defendants, cross-complainants and cross-plaintiffs, and to any other creditors whom the court may find to be entitled to share with these defendants in the property and assets of the defendant Railroad Company, or the proceeds thereof."

Neither the petition, the answer nor the cross-bill of said Edwin G. Merrill, et al, contained any allegation with respect to any bonds having been deposited with said committee by the Chicago, Rock Island and Pacific Railway Company, and it nowhere appears in any pleading filed prior to the filing of the cross-bill of Toledo, St. Louis and Western Railroad Company on March 1st, 1918, of which complaint is made in the petition herein, that the Chicago, Rock Island and Pacific Railway Company had deposited $5,047,000.00 par value B. bonds and $400,000.00 A. bonds, or any other amount of either of said bonds with said committee.

Mr. Lawrence Maxwell's name did not appear on any pleading filed by Merrill, et al, as one of counsel for said bondholders' committee and counsel of record for that committee disclaimed before the special master any right to appear or act for the Chicago, Rock Island and Pacific Railway Company.

The Central Trust Company of New York, on October 18, 1915 (not March 5, 1917, as alleged in the petition herein) by counsel other than Mr. Maxwell, filed a cross bill as trustee under the collateral trust agreement of August 1st, 1907, to foreclose the lien of the collateral trust bondholders on the shares of Chicago and Alton stock pledged by said agreement to secure said bonds.

On November 9, 1915, Jules S. Bache, et al, as a stockholders' protective committee (representing stockholders of Toledo, St. Louis & Western Ry. Co.) filed an answer to the answer and cross bill of Edwin G. Merrill, et al, in which answer the stockholders' protective committee made the following, among other allegations:

> "On information and belief that certain officers and directors of defendant, including one Edwin Hawley and other persons whose names are to them unknown, together with one Benjamin F. Yoakum, who at that time was chairman of the board of directors of the Rock Island Company, were at the time of said attempted sale of said shares of preferred and common stock of the Alton Company to the defendant, financially interested in and owned certain of said shares of stock, all which was well known to the Trust Company, the Rock Island Company and the other parties and persons owning said preferred and common stock, and was unknown to the other officers, directors and stockholders of defendant; that the price at which said preferred and common stock was purported to be sold to the defendant was very much in excess of the real value or market value thereof, as said Rock Island Company, and the other parties and persons owning said stock, and the said certain officers and directors of defendant, who were financially interested in said stock,

each and all well knew; that for want of knowledge they are unable to more definitely state the excess value at which said stock was so purported to be sold to the defendant; that the proceeds and alleged bonds representing said excessive price for said Alton stock received by the Rock Island Company as a result of and from the purported sale of said stock to the defendant were divided and distributed by the Rock Island Company with the knowledge and consent of the other parties and persons financially interested in said stock, with said certain officers and directors of the defendant, in pursuance of and compliance with a secret agreement and understanding between said Rock Island Company and the other parties and persons interested in said stock of the one part, and said certain officers and directors of the defendant of the other part, to the effect that such proceeds and bonds should be so divided and distributed, fraudulently, and without the knowledge or consent or approval of the other officers, directors or stockholders of said defendant; that the present holders of a large part, if not all of said series "A" and series "B" bonds knew at the time they acquired their bonds respectively, of said fraud practiced by and between the Rock Island Company and the persons and parties financially interested in said preferred and common stock of the one part, and of said certain officers and directors of the

defendant of the other part; that by reason of the facts aforesaid said bonds in the hands of said holders are invalid, void and unenforceable."

On March 5, 1917, an order was made appointing Guy W. Kinney Special Master to take testimony, of which order a copy appears beginning on page 15 of the petition herein.

Testimony has since been taken by said Special Master covering many thousands of typewritten pages. The taking of said testimony has not yet been completed and said Special Master has not yet made his final report thereof to the Court.

On March 1st, 1918, there came regularly on for hearing in said cause a motion of Toledo, St. Louis & Western Railroad Company for leave to file a pleading entitled "Answer of Toledo, St. Louis and Western Railroad Company to the answer and cross-bill of Edwin G. Merrill, et al, and cross-bill of Toledo, St. Louis and Western Railroad Company." Upon the hearing of said motion, said pleading was tendered to and examined by the court.

Said cross-bill contained allegations, among others, to the following effect:

That the Chicago, Rock Island and Pacific Railway Company, referred to in said pleading as the "Rock Island Company" had attempted to sell to the

Toledo, St. Louis and Western Railroad Company one hundred and forty-four thousand two hundred (144,200) shares of common stock and sixty-three thousand eight hundred shares (63,800) of preferred stock of the Chicago and Alton Railroad Company; that one hundred and forty-four thousand two hundred shares of common stock and forty-one thousand one hundred shares of said preferred stock were owned by the Rock Island Company and that others owned the remainder of said stock and that the Rock Island Company acted for them in attempting to make the sale thereof; that one Edwin Hawley was then a director and vice-president of the Toledo, St. Louis and Western Railroad Company and its sole representative in the negotiations for the attempted purchase of said Chicago and Alton stock; that said Hawley was one of the owners of the Chicago and Alton stock for whom the Rock Island Company was acting in said transaction; that the price at which it was attempted to sell said stock to the Toledo, St. Louis and Western Railroad Company was more than double the real and market value of said stock; that Hawley's interest in said stock was by a fraudulent arrangement between himself and the Rock Island kept secret from all of his associate officers and directors of the Toledo, St. Louis and Western Railroad Company; and that it was agreed between the Rock Island Company and said Hawley

"that said Edwin Hawley, individually, should be paid by and receive from the Rock Island Company for his services in procuring and inducing this defendant to purchase said Alton stock the sum of one hundred and ninety-three thousand ($193,000.00) dollars in cash; that in pursuance of said secret agreement said Edwin Hawley did induce and fraudulently bring about said purported purchase of said Alton stock by this defendant and said Rock Island Company paid and caused to be paid to said Edwin Hawley on or about the 4th day of October, 1907, and said Edwin Hawley received from the Rock Island Company said sum of one hundred and ninety-three thousand dollars ($193,000.00) for the consideration aforesaid, all without the knowledge of this defendant or of any of the other directors or officers of this defendant;" that said money was received by Hawley for his own use and kept by him in pursuance of said secret and fraudulent arrangement between himself and the Rock Island Company; said cross-bill further alleged "That as a part of said attempted purchase by this defendant of the stock of the Alton Company all of said series "A" and "B" bonds were delivered as aforesaid to the Rock Island Company or its order by the Trust Company at the time of the purported purchase of the said Alton stock and that all of said "B" bonds amounting to five million forty-seven thousand

dollars ($5,047,000.00) par value and $400,000.00 par value of "A" bonds are now owned by the Rock Island Company and have been by it so owned continuously since the date that they were delivered to it by the Trust Company as aforesaid"; that a large part of the remainder of the "A" bonds aggregating six million and eighty thousand dollars ($6,080,000.00) par value "were by the Rock Island Company or through its acts placed and are now in the posesssion of parties and persons who claim to be good faith holders thereof" without knowledge of the fraud in their inception, and that if the Toledo, St. Louis and Western Railroad Company is obliged to pay any of said bonds owned by good faith holders that it would thereby "through the fraud and wrongdoing of the Rock Island Company as hereinbefore set forth" be damaged in the amount it might so be required to pay and that it has also been damaged by reason of the fraud and wrongdoing of the Rock Island in an amount of approximately one million dollars ($1,000,000.00) being the excess interest paid by it on the "A" and "B" bonds over the dividends received on the Alton stock, and The Toledo, St. Louis and Western Railroad Company tenders the Alton stock for such disposition as the court may deem proper upon cancellation of all of the "A" and "B" bonds.

The cross-bill sets out the filing of the cross-bill by

the Central Trust Company asking for the sale of the Alton stock, its application to the bonds and judgment for the deficiency against the Toledo, St. Louis and Western and recites that the Toledo, St. Louis and Western has filed an answer to said cross-bill of the Central Trust Company and that the stockholders' committee has filed an answer thereto as well as the Western Union Telegraph Company as a creditor, and that all of said pleadings raised the same issues as to the validity of the bonds as in the pleadings of the Toledo, St. Louis and Western Railroad Company; alleges all of such issues were referred on the 5th day of March, 1917, to a special master for the purpose of taking testimony; that the taking of such testimony began on April 2, 1917, and "That upon the beginning of the taking of said testimony before said special master, said The Chicago, Rock Island & Pacific Railway Company, under the authority of the order entered by this court on the 22nd day of October, 1914, to which order reference is hereby made, intervened and appeared by its counsel and entered its appearance herein, and from time to time, since said date, has, as the owner and holder of certain of said A bonds and as the owner and holder of all of said B bonds, by virtue of said order last mentioned, and of the said answer and cross-bill of said Bondholders' Committee participated in the taking of testimony and in making objections and taking

exceptions to testimony offered, and in making stipulations as to matters occurring during said hearing; that thereby said The Chicago, Rock Island & Pacific Railway Company has entered its appearance in this suit, and has become a party hereto, and has rendered itself subject to the jurisdiction of this court herein."

The prayer of the cross-bill is as follows:

"(a) That the answer and cross-bill of Edwin G. Merrill et al, as a Bondholders' Committee may be dismissed; that the alleged bonds described in said answer and cross-bill be declared to be null and void and that said Edwin G. Merrill et al, as a Bondholders' Committee and each and all of the owners and holders of said bonds be forever enjoined from enforcing or attempting to enforce any of said bonds or any of said interest coupons thereof against this defendant or its property and assets; and said Edwin G. Merrill et al, as a Bondholders' Committee, The Chicago, Rock Island & Pacific Railway Company and each and all other owners and holders of said bonds be ordered to cancel and surrender said bonds and the interest coupons thereof and each and all of the same to this defendant.

(b) That in the event any of said A bonds are found to be valid obligations of this defendant, and that the holders thereof are good faith owners of same, that the court order, decree and adjudge that this de-

fendant shall have and recover of The Chicago, Rock Island & Pacific Railway Company any and all sums which it may be by said order and decree required to pay to such good faith bondholder, if any, together with interest thereon.

(c) That the court take an accounting of the amount which this defendant has paid for and on account of the interest upon said A and B bonds in excess of the amount which it has received as dividends upon said Alton stock, and that it may have and recover from said The Chicago, Rock Island & Pacific Railway Company such excess amount with interest thereon.

(d) That The Chicago, Rock Island & Pacific Railway Company may be held to be a party to this suit and required to answer hereto within the time required by law, or failing so to do that the allegations hereof shall be taken as confessed by said The Chicago, Rock Island & Pacific Railway Company.

(e) This defendant further prays for all relief to which it may be entitled by reason of the premises."

Upon said hearing on said motion for leave to file said answer and crsos-bill evidence was introduced tending to prove the truth of the allegations in the cross-bill of Toledo, St. Louis and Western Railroad Company to

the effect that The Chicago, Rock Island and Pacific Railway Company had intervened in said cause in its own name and in its own right and had entered its apperance therein and had become a party to said cause and subjected its person to the jurisdiction of said court.

On March 1, 1918, as a result of the hearing just above mentioned, the court, in the exercise of its judicial discretion, entered an order granting leave to file said answer and cross-bill of the Toledo, St. Louis and Western Railroad Company, and said pleading was on March 1, 1918, duly filed.

On March 11, 1918, there was filed in said court a notice directed to "Chicago, Rock Island and Pacific Railway Company, Lawrence Maxwell, Solicitor" and signed by the solicitors for the parties who had filed said pleadings on March 1, 1918, which notice was as follows:

> "There is handed you herewith duly certified copy of each and all of the following pleadings which were filed by leave of court, in the above entitled suit on the 1st day of March, 1918, viz: Amendment to Bill of Complaint; Amendment to Answer of Jules S. Bache et al, to the Answer and Cross-Bill of Edwin G. Merrill et al; Amendment to the Answer of Jules S. Bache et al to the Cross Bil lof Central Trust Company of New York as Trustee; Amend-

ment to the Answer of The Western Union Telegraph Company to the Answer and Cross-Bill of Edwin G. Merrill et al; Amendment to the Answer of The Western Union Telegraph Company to Cross-Bill of Central Trust Company of New York as Trustee; Answer of Toledo, St. Louis & Western Railroad Company to the Answer and Cross-Bill of Edwin G. Merrill et al and cross-bill of Toledo, St. Louis & Western Railroad Company; and Answer of Toledo, St. Louis & Western Railroad Company, to the Cross-Bill of Central Trust Company of New York as Trustee."

Upon this notice there was endorsed the following: "Cincinnati, Ohio, March 9, 1918. Received original of the above notice and certified copies of pleadings therein enumerated. Lawrence Maxwell, per M. Hackett, Solicitor for Chicago, R. I. & Pacific Ry. Co."

On March 11, 1918, said notice and acknowledgement having been brought to the attention of the court, the court considered further the evidence which had been introduced with respect to the entry of appearance of The Chicago, Rock Island and Pacific Railway Company in said suit and from said evidence the court in the exercise of its judicial discretion found that The Chicago, Rock Island and Pacific Railway Company had entered its appearance in and had become a party to

said cause and had fully submitted itself to the jurisdiction of said court for all proper purposes as a party thereto, and that it should properly be required to answer in said cause the claim asserted in said cross-bill of The Toledo, St. Louis and Western Railroad Company, filed on March 1st, 1918.

And thereupon on March 11, 1918, the court entered an order in which it was recited that the solicitors for the Toledo, St. Louis and Western Railroad Company and other parties had "filed in this suit copy of notice to Chicago, Rock Island and Pacific Railway Company, Lawrence Maxwell, Solicitor, and made due proof that the original of said notice together with duly certified copies of * * * answer of Toledo, St. Louis and Western Railroad Company to answer and cross-bill of Edwin G. Merrill et al, and cross-bill of Toledo, St. Louis and Western Railroad Company, * * * the originals of which pleadings were filed in this suit on the first day of March, 1918, were duly delivered to and served upon Lawrence Maxwell, Solicitor for Chicago, Rock Island and Pacific Railway Company in this suit on the 9th day of March, 1918," and in which order the court found that the Chicago, Rock Island and Pacific Railway Company "has heretofore entered its appearance as a party to this suit" and by which it was ordered that the Chicago, Rock Island and Pacific Railway Company "be accorded and allowed ten

days from the date of the entry hereof within which it is required to reply to the said cross-bill of Toledo, St. Louis and Western Railroad Company, and to such, if any of the other above enumerated pleadings as said Chicago, Rock Island & Pacific Railway Company may desire to reply, and in default of such reply a decree *pro confesso* against The Chicago, Rock Island & Pacific Railway Company may be entered on said cross-bill of Toledo, St. Louis & Western Railway Company, and upon the other above enumerated pleadings as in default. * * * *"

On March 20, 1918, the Chicago, Rock Island and Pacific Railway Company filed a motion in said cause of which a copy appears upon page 11 of the petition herein.

Said motion of the Chicago, Rock Island and Pacific Railway Company was duly submitted to the court and evidence in support of and in opposition to said motion was heard and considered by the court and the court, in the exercise of its judicial discretion and for reasons which the court deemed proper including the reasons set forth in an opinion filed by it in said cause November 3, 1919, a copy of which appears on pages 19 to 21 inclusive of the petition herein, entered an order overruling said motion and fixing a time within which the Chicago, Rock Island and Pacific Railway

Company might plead to said several pleadings filed March 1, 1918, which order, so far as material herein, was as follows:

"This cause came on to be heard upon the motion of the Chicago, Rock Island and Pacific Railway Company filed herein on March 20, 1918, to set aside the finding and order of the court entered March 11, 1918. On consideration whereof said motion is overruled to which the Chicago, Rock Island and Pacific Railway Company excepts and said Chicago, Rock Island and Pacific Railway Company within twenty days from the date of the entry hereof is required to plead to said cross-bill of Toledo, St. Louis and Western Railroad Company and to such, if any, of the other pleadings enumerated in said order of March 11, 1918 * * * as said Chicago, Rock Island and Pacific Railway Company may desire to plead to and in default thereof a decree *pro confesso* against Chicago, Rock Island and Pacific Railway Company may be entered upon said cross-bill of said Toledo, St. Louis and Western Railroad Company and upon the other above enumerated pleadings as in default. The Chicago, Rock Island and Pacific Railway Company excepts to said order upon the grounds that the court is without jurisdiction to make the same or to require it to plead to said pleadings or any of them and because it is not a resident of the State of Ohio."

On December 3, 1919, the Chicago, Rock Island and Pacific Railway Company filed a motion in said cause, a copy of which appears upon pages 12 and 13 of the petition herein.

The motion of the Chicago, Rock Island and Pacific Railway Company, filed on December 3, 1919, came duly on for hearing and was heard on evidence by the court and the court in the exercise of its judicial discretion and for reasons which the court deemed proper including the reasons set forth in an opinion filed April 15, 1920, a copy of which appears on page 22 of the petition herein, filed on April 15, 1920, an order overruling said motion, a copy of which order appears upon page 13 of the petition herein.

On May 6, 1920, the Chicago, Rock Island and Pacific Railway Company filed in said cause an answer to the cross-bill of Toledo, St. Louis and Western Railroad Company in which, among other things, it admits that "it deposited with the Trust Company 144,200 shares of the common stock and 45,100 shares of the preferred stock of the Alton Company and received in exchange $5,047,000.00 par value of the series B bonds and $4,510,000.00 par value of the series A bonds of the Toledo, St. Louis & Western Railroad Company" and further "that at the time of the purchase of the Alton stock by the defendant Toledo, St. Louis and Western Railroad Company, Edwin Hawley

was a director and vice-president of said defendant corporation" and "that on or about the 4th day of October, 1907, said Edwin Hawley received from the hands of officers of this defendant the sum of $193,000.00."

Said answer further admits "that $5,047,000.00 par value of the said B bonds and $400,000.00 par value of said A bonds were owned by this defendant until the formation of the Bondholders' Committee composed of Edwin G. Merril et al, intervenors in this cause, and allege that shortly thereafter this defendant transferred to and deposited with said committee under and pursuant to the terms of the deposit agreement dated August 3, 1914, all of its said A bonds and all of its said B bonds."

The evidence upon which the court acted in making the findings and orders of which complaint is made in said petition is not set out in said petition. Respondent denies the statement in the brief for petitioner that "The only basis for the claim that the District Court has jurisdiction of the person of the Rock Island Company is that Mr. Maxwell entered its appearance by appearing as counsel for the Bondholders' Committee." The original entry of appearance by Mr. Maxwell quoted in the petition and in the brief is only one item

out of a large number of items of evidence considered by the court upon this point.

No steps were taken by petitioner to preserve and have certified a record of the evidence submitted on the hearings of said motions or to obtain a review of the orders complained of by appeal or error proceedings.

Having made full and due return to said rule, respondent prays that said rule may be discharged and that said petition may be dismissed.

JOHN M. KILLITS,

Judge of the United States Court for the Northern District of Ohio, Western Division.

IN THE

Supreme Court of the United States

October Term 1920

Original No. 24

IN RE THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Petitioner.

BRIEF

IN OPPOSITION TO THE PETITION.

THOS. H. TRACY,
GEO. D. WELLES,
Solicitors for The Toledo, St. Louis & Western Railroad Company and Amici Curiae.

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LIST OF CASES CITED

IN THE

Supreme Court of the United States

October Term 1920

Original No. 24

IN RE THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,
Petitioner.

BRIEF IN OPPOSITION TO THE PETITION.

STATEMENT OF THE CASE

Horatio C. Creith filed a creditors' bill on behalf of himself and all other creditors of The Toledo, St. Louis & Western Railroad Company in the District Court of the United States for the Northern District of Ohio, Western Division. That court appointed a receiver of all of the company's property, appointed a special master, enjoined all other suits against the company and its property, and gave all creditors leave to file their claims before the special master or to inter-

vene. Merrill, et al, as a committee under a bondholders' protective agreement, intervened and filed a cross-bill, asking for a personal judgment against the company on certain collateral trust bonds, series "A" and "B". Jules S. Bache, et al, a committee of stockholders of The Toledo, St. Louis & Western Railroad Company, answered the bondholders' cross-bill. This answer alleged that the bonds had been issued as a result of a fraudulent conspiracy between The Chicago, Rock Island & Pacific Railway Company (hereinafter referred to as the Rock Island Company) and one of the officers of the Toledo, St. Louis & Western Railroad Company, and were, therefore, void. The issues as to the validity of the bonds raised by these pleadings and others were referred to the special master above mentioned. Upon the hearing before him the Rock Island Company, in its own name and by its own separate counsel, appeared and exercised all the rights of an intervening party. Counsel of record for the bondholders' committee upon this hearing disclaimed that they represented the Rock Island Company.

The Rock Island Company still owns $5,447,000.00 of the bonds which were issued in pursuance of the fraudulent conspiracy above mentioned, and has disposed of $6,080,000.00 par value of bonds of the same issue to persons who now claim to be inno-

cent holders for value, most of whom are represented by the Bondholders' Committee.

After the Rock Island Company had intervened for the assertion and protection of its own rights as a bondholder, as above stated, the District Court granted an application of The Toledo, St. Louis & Western Railroad Company for leave to file a cross-bill against the Rock Island Company. This cross-bill alleges the fraud of the Rock Island Company, above mentioned, in detail, asserts that The Toledo, St. Louis & Western Railroad Company will be damaged as a result of the fraud of the Rock Island Company to the extent of any amount which it may be required to pay to innocent bondholders, and seeks a recovery over against the Rock Island Company of whatever amount The Toledo, St. Louis & Western Railroad Company may be compelled to pay to innocent bondholders, and of $1,000,000.00 paid out as interest on said bonds, while it was in ignorance of the fraud.

Notice of the filing of this cross-bill was served (in accordance with Equity Rule 31) on the solicitor who had prior thereto appeared in behalf of and conducted the litigation for the Rock Island Company and was acknowledged by him as "Solicitor for The Chicago, Rock Island & Pacific Railway Company." Upon proof of this service and after hearing evidence, the

District Court held upon the evidence that the Rock Island Company had entered its appearance and had become a party to the suit, and that the cross-bill raised issues which were proper in the pending suit. The District Court therefore fixed a time (ten days) for the Rock Island Company to answer the cross-bill of The Toledo, St. Louis & Western Railroad Company.

Within the time so fixed the Rock Island Company filed a motion in which it asked the District Court to vacate its order requiring the Rock Island Company to answer, "On the ground that the court was without jurisdiction to make said order or over this defendant as a party to said cross-bill."

The court heard evidence on this motion as to whether the Rock Island Company had entered its appearance and become a party, and again found that the Rock Island Company had entered its appearance and become a party and overruled the motion. The Rock Island Company thereupon filed another motion by which it moved the court "To dismiss so much of said cross-bill as seeks to recover moneys from The Chicago, Rock Island & Pacific Railway Company, upon the ground that it is not suable in this suit or in this district upon said pretended cause of action, not being an inhabitant of the district or of the State of Ohio, and

neither it nor the cross-complainant being a resident of the district or state."

This motion the court also overruled after hearing evidence. The Rock Island Company then answered, and by this answer admitted that it owned $5,447,000 of the bonds in controversy and alleged that same had been deposited with the bondholders' committee, and admitted that the vice-president of The Toledo, St. Louis & Western Railroad Company received from the Rock Island Company the amount which the cross-bill alleges was paid as a secret and fraudulent commission by the Rock Island Company.

Without having preserved any record for reviewing the proceedings below by appeal or in error, the Rock Island Company has applied to this court for a writ of prohibition or mandamus directed to the District Court to restrain further proceedings against it upon the cross-bill of The Toledo, St. Louis & Western Railroad Company. This petition is not accompanied by any record of the evidence heard below. To the rule to show cause, issued upon the filing of this petition, the District Court has made a return showing that the decisions of which petitioner complains were made, as above stated, upon evidence, and as a result of the exercise of the judicial discretion of the District Court in applying the law to the facts as found by it.

The brief for petitioner contains argument and authorities from which we deduce that petitioner claims a writ should issue herein for the following alleged reasons:

(*a*) Because the District Court as a Federal Court has no jurisdiction of the claim of The Toledo, St. Louis & Western Railroad Company for recovery over against the Rock Island Company, neither company being a resident of the Northern District of Ohio.

(*b*) Because the District Court had no jurisdiction over the person of the Rock Island Company, no process having been issued for that company.

(*c*) Because the District Court was in error in holding that the Rock Island Company had entered its appearance in the action.

(*d*) Because the District Court had no jurisdiction to compel the Rock Island Company to meet issues tendered by a cross-bill filed subsequent to the time the Rock Island Company became a party, if it did become a party.

ARGUMENT

The petitioner asks in the alternative for the issuance either of a writ of prohibition or of mandamus to

the District Court. Writs of prohibition do not issue to the District Court except in cases of admiralty and maritime law.

Ex parte Graham, 10 Wall. 541-2-3;
Ex parte Easton, 95 U. S. 68-72;
In re Massachusetts, 197 U. S. 482-488;
Ex parte Christy, 3 Howard 292-322.

In other cases mandamus and not prohibition is the proper remedy where it is claimed the District Court has usurped jurisdiction. (*Ex parte Wisner*, 203 U. S. 449.)

Neither remedy will issue in any case to control the judicial discretion of the District Court, to compel it to decide a question within its jurisdiction in any particular way, to serve the purpose of an appeal or writ of error for the correction of errors or irregularities in its proceedings, or to review its judgment on the facts in a case of a class in which it has power to pass upon the facts.

That the foregoing states the rule as to prohibition is established by:

Smith and Whitney, 116 U. S. 167-176;
Ex parte Ferry Co., 104 U. S. 519-520;
In re Fassett, 142 U. S. 479-486;
Ex parte Christy, 3 Howard 292-308;
Ex parte Pennsylvania, 109 U. S. 174.

That the same rules hold true in mandamus is established by:

In re Atlantic Railroad, 164 U. S. 633;
In re Huguley Mfg. Co., 184 U. S. 297-301;
In re Key, 189 U. S. 84;
In re Morrison, 147 U. S. 14-26;
Ex parte American Steel Barrel Co., 230 U. S. 35-45-6.

We direct particular attention to *In re Atlantic Railroad, Supra*, and to *In re Huguley Mfg. Co., Supra*, in each of which objections had been made to the jurisdiction of the District Court and overruled by that court, and in each of which it was held that there being an adequate remedy by appeal mandamus should be denied.

The statement quoted in the brief for petitioner at page 2 from *In re Winn*, 213 U. S. at page 467 "An appeal or writ of error at the end of long and expensive proceedings which must go for naught if the District Court is without jurisdiction is not an adequate remedy," is expressly disapproved and overruled in *Ex parte Harding*, 219 U. S. 363, 377-379, where the earlier decisions of the court are reviewed and discussed at length.

The real question therefore presented by the present proceeding is this: Has the court below made orders which it is apparent it could have no power to make in any circumstance in a case of the character of the pending suit? If the answer to this question is "yes," the writ should issue. If the answer is "no," the writ should not issue. Stated concretely, if it is within the power of a District Court proceeding upon a creditors' bill to find upon evidence that another creditor has intervened and become a party, and to order, (*a*) that the original defendant may file a cross-bill against such intervenor, and (*b*) that the intervenor must answer the cross-bill or suffer a decree *pro confesso*, then it follows that this court will not interfere with the court below by prohibition or mandamus.

We submit that the mere statement of this situation carries the answer to the question. A court of equity certainly has jurisdiction to determine whether a creditor of the defendant named in a creditors' bill has intervened and entered his appearance.

Equity Rule 37 provides:

> "All persons having an interest in the subject of the action, and in obtaining the relief demanded, may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. Any person may, at any time, be made a party if his pres-

ence is necessary or proper to a complete determination of the cause. Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when anyone refuses to join, he may, for such reason, be made a defendant.

"*Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention,* but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

The decision of a court upon the question as to whether there has been an intervention upon the record before it, may be right or it may be wrong, but right or wrong it is a matter within the jurisdiction of the court to decide, and, having been decided, the issue is set at rest unless and until the decision is reversed by proceedings on appeal or writ of error.

That a court of equity has jurisdiction to authorize one party to a suit before it to file a cross-bill directed against another party to the same suit is beyond dispute. This is something which is done every day in every court in the land, and the filing of such a pleading is expressly authorized by Equity Rule 30.

This proposition has nothing to do with the question of the power of the court to permit *new* parties to intervene and introduce new claims against the orig-

inal defendant in a proceeding *in personam* without the issuance of new process as was the case in *Ex parte Indiana Transportation Company*, 244 U. S. 456, relied upon by counsel for petitioner. If that decision were applied as between the original parties to a suit and others who come in by consent of all concerned, it would deprive the courts of all power to do complete justice between parties and would nullify Equity Rules 30 and 31, a part of which for convenience we here quote:

Equity Rule 30.

> "The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit, and may, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counter-claim, so set up, shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and the cross-claims."

Equity Rule 31.

> "If the counter-claim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for

filing a reply. In default of a reply, a decree *pro confesso* on the counter-claim may be entered as in default of an answer to the bill."

The claim for petitioner amounts to this: That petitioner may intervene in the court below for the purpose of obtaining a money judgment against the defendant (either in its own name or in that of its representative, the Bondholders' Committee) upon bonds owned by intervenor, without submitting itself to the jurisdiction of the court so far as defendant's rights against it growing out of the same matter are concerned. Petitioner will, of course, concede that the court has jurisdiction to enter judgment against The Toledo, St. Louis & Western Railroad Company in the pending equity suit for the amount claimed on the bonds owned by the Rock Island Company and other bondholders who have deposited their bonds with the committee. The present contention of the Rock Island Company is that it may actively intervene for the purpose of bringing about such a judgment and that the defendant must submit to such a judgment and to the consequent sale of its property and destruction of its business without being permitted to assert as against the Rock Island Company its claim that the Rock Island Company, because of its fraud, in obtaining and dis-

posing of these very bonds, is liable over to The Toledo, St. Louis & Western Railroad Company. Petitioner would have a court of equity enforce the claims of the bondholders against The Toledo, St. Louis & Western Railroad Company and say to The Toledo, St. Louis & Western Railroad Company "These bondholders are here for the purpose of pursuing you, but you cannot pursue them even though your present liability grows out of the wrong of one of these very bondholders. You must submit to a sale of your property, the destruction of your business and the distribution of your assets to these bondholders, and then you must go to another district and there bring suit in a court of law for the recovery from the Rock Island Company of the damages which its fraud, in connection with the issuance of these bonds, has imposed upon you." The contention of petitioner is not only that a court of equity should so hold in the instant case, but that it is powerless in any circumstances to hold otherwise; that for it to attempt to protect the interests of the defendant by requiring the fraudulent wrong-doer to answer for his fraud in the pending litigation in which it has intervened is a usurpation of power by the court and an attempt to exercise jurisdiction in a matter wholly outside the scope of the court's jurisdiction. That this position of the petitioner is unsound, we submit is ob-

vious. A consideration of Equity Rules 30, 31 and 37, supra, and of the following authorities establishes not only that the court was acting within the limits of its judicial discretion in determining that the cross bill might properly be filed, but was moreover right in the conclusion reached.

Portland Wood Pipe Co. v. Slick Bros. Const. Co. et al., 222 Fed. 528 (D. C.).

In this case it was held that under Equity Rule 30 in a suit by a non-resident of the district to foreclose a mechanic's lien, in which suit the contractor and a sub-contractor, resident citizens of the district, were made defendants, and the sub-contractor by a cross-bill asserted a lien upon the property,

> "The court has jurisdiction over a counter-claim by the contractor against the subcontractor for moneys advanced and supplies furnished the subcontractor on account during the progress of, and for use in carrying on, the work, though the amount of the counter-claim exceeds the amount due the subcontractor, and has jurisdiction to render judgment against the subcontractor for the balance, under the rule that, where the court has jurisdiction of the controversy exhibited by the complaint, it may assume

jurisdiction to adjudicate incidental issues raised by cross-bills between defendants, regardless of citizenship or the amount in dispute."

(*Par. 1 of syllabus.*)

In the case of *Caflisch v. Humble*, 251 Fed. 1-4, the Circuit Court of Appeals for the Sixth Circuit reviewed the authorities and held that as defendant's counter-claim for damages for breach of the contract in question arose out of the transaction which was the subject matter of the suit, "Under the first clause of the second paragraph of Equity Rule 30 the defendant was required to set up its counter-claim or waive it."

The court further held:

"Whenever practicable to do so, a court of equity should do justice completely and not by halves. *Camp v. Boyd*, 229 U. S. 530, 551, 33 Sup. Ct. 785, 57 L. Ed. 1317; *Chicago, Mil. & St. P. Ry. v. United States*, 244 U. S. 351, 359, 37 Sup. Ct. 625, 61 L. Ed. 1184. The plaintiffs being non-residents of the district from which this case came, a peculiar equity runs in defendant's favor, and he should not be sent to a distant district to try out what ought rightfully to be determined in the original suit. *Rolling Mill Co. v. Ore & Steel Co.*, 152 U. S. 596, 616, 617, 14 Sup. Ct. 710, 38 L. Ed. 565; *Porter v. Roseman*, 165 Ind. 255, 260, 261, 74 N.

E. 1105, 112 Am. St. Rep. 222, 6 Ann. Cas. 718."

In *Williamson v. Collins*, 243 Fed. 835, C. C. A. Sixth Circuit, it was held that a decree should be entered on a cross bill against intervening bondholders requiring them to repay to the company the amount it was required to pay to holders for value of bonds originally issued to the intervenors without consideration. The district court had obtained jurisdiction and control of the company and its property and the Circuit Court of Appeals said at p. 840, "It was clearly within the power of a court of equity, under the circumstances, to fix the rights of the parties, both as against the company and its property, and, in relation thereto as between themselves," and further (par. 13 of the syllabus) that "Where persons to whom corporate bonds were issued as a bonus, with full knowledge of all the facts constituting the company's defense as to them, transferred the bonds to bona fide holders, their liability to the company was not limited to the amount received by them on the sale of the bonds, but extended to the face of the bonds and the matured coupons." See also—

Howard v. Leete, et al., 257 Fed. 918-22-3-4-5 C. C. A. 6th Circuit.

Springfield Milling Co. v. Barnard &

Leas Mfg. Co., 81 Fed. 261-4-5, C. C. A. 8th Circuit;

Approved in 251 *Fed.* 1, *Supra.*

Knupp et al v. Bell et al, 243 Fed. 157-161 C. C. A. 4th Circuit.

Paramount Hosiery Form Drying Co. vs. Walter Snyder Co. et al, 244 Fed. 192 (D. C.).

As the court (as we have shown) had jurisdiction (*a*) to find and determine that the Rock Island Company had entered its appearance and become a party, and (*b*) had jurisdiction to grant leave to the defendant to file a cross-bill against the Rock Island Company, there can be no question but that the court also had jurisdiction (*c*) to require the Rock Island Company to answer the cross-bill or suffer a decree *pro confesso.*

Equity Rule 31 contains express authority for such an order.

This rule was followed by the service of a copy of the cross-bill on the solicitor for the Rock Island Company and its receipt by him as such solicitor was duly acknowledged and proved to and found by the District Court. ' (Return, page 17.).

We now come to a specific reply to the points raised in the brief for petitioner.

The District Court Has Jurisdiction as a Federal Court.

The Toledo, St. Louis & Western Railroad Company is an Indiana Corporation. The Chicago, Rock Island & Pacific Railway Company is an Illinois corporation. The suit is pending in the Northern District of Ohio, of which neither is an inhabitant, and the Rock Island Company therefore claims that the court below is without jurisdiction of any controversy between them. The court below has found, however, that the Rock Island Company voluntarily submitted itself to the jurisdiction of that court; that it intervened and became a party to the suit on the creditors' bill against the Toledo, St. Louis & Western Railroad Company. The Rock Island Company has, therefore, waived the right to complain that the suit is not in the proper district.

Matter of Albert N. Moore, 209 U. S. 490;

Western Loan & Savings Co. vs. Butte & Boston Consolidated Mining Co., 210 U. S. 368;

Tate vs. Baugh, Sheriff, 252 Fed. 317-19.

If it be said that the Rock Island Company did not waive this jurisdictional question so far as the

cross-bill of the Toledo, St. Louis & Western Railroad Company is concerned, the answer is two-fold: (1) It is not possible for a party to consent that the court may have jurisdiction of his person for his protection, while, at the same time, withholding from the court jurisdiction of his person to protect the rights of other parties properly involved in the pending litigation. If this claim is made it amounts to saying that the Rock Island Company's entry of appearance in the case was wholly one-sided, and that a party may come into a court of equity and accept the benefits of its jurisdiction, and may, at the same time, escape its power so far as the rights of other parties are concerned. This is not the law.

> "A court of equity ought to do justice completely and not by halves."
>
> *Camp vs. Boyd*, 229 U. S. 530-551.
>
> 2d par. of Equity Rule 30.

The second answer to this claim, if made, is that the Rock Island Company not only entered a general appearance in the litigation prior to the filing of the cross-bill, but re-entered a general apearance to the cross-bill itself by the motion which it filed seeking to have the order requiring it to answer vacated, "On the ground that the court was without jurisdiction to make

said order or over this defendant as a party to said cross-bill." The fact that in this motion the Rock Island Company has stated that it appeared solely for the purpose of the motion "and not intending to submit itself to the jurisdiction of this court as a party to the suit" is of no importance, if, in fact, the action taken by it does constitute a submission of its person to the jurisdiction of the court. "A party cannot be at once in court and out of court. He may not, in the same breath, dispute the merits of the cause alleged against him and deny jurisdiction of the court over his person."

Crawford vs. Foster, 84 Fed. 939-941.

The claim in the motion "that the court was without jurisdiction to make said order" raised the question as to whether the court had jurisdiction, (*a*) over the subject matter as a Federal Court, and (*b*) over the subject matter as a court of equity. The claim in the motion that the court was without jurisdiction "over *this defendant* as a party to said cross-bill," recognizes the fact that the Rock Island Company is a defendant and does not raise the question of the residence of the Rock Island Company or of the service or lack of service of process upon it, or whether it has by its own action become a party, but raises only the point that the court had no jurisdiction over it as a party to the par-

ticular cross-bill filed by The Toledo, St. Louis & Western Railroad Company. This amounts to a demurrer for misjoinder of parties. Such a motion might well be made by one who was admittedly a party to the original litigation. It goes, not to the jurisdiction of the court over the person of the Rock Island Company, but to its jurisdiction over the subject matter.

The filing of a motion, which raises such questions has been held many times to constitute an entry of appearance and a waiver of the claim that the suit is pending in the wrong district.

Western Loan and Savings Co. vs. Butte and Boston Consolidated Mining Co., 210 U. S. 369-370-371-372.

Fitzgerald Construction Company vs. Fitzgerald, 137 U. S. 98-106.

Nelson vs. Husted, et al, 182 Fed. 921, 923, 924.

Crawford vs. Foster, 84 Fed. 939-941.

Mahr vs. Union Pacific R. R. Co., 140 Fed. 921.

For the foregoing reasons, therefore, we submit that there can be no question but that the court below as a Federal Court had jurisdiction to enter the order complained of.

Service of Process Is Not Necessary to Give a Court Jurisdiction Over the Person.

It needs no citation of authority to establish the proposition that a voluntary appearance by a party subjects his person to the jurisdiction of the court as effectually as if process had been issued and served upon him, but it is claimed by petitioner that this rule can have no application where the person who enters his appearance has not been named as a party in pleadings. No authorities are cited in support of this claim, and the contrary has been held by this court and others.

> "And although plaintiffs did not originally, or by amendment after answer, make him in terms a party to their bill, which would have disclosed that he was a citizen of New York, yet the effect of what was done was such as bound him by the decree, and *we think upon this record he must be held to have become such.* A person who has not been named as defendant to a bill may appear at the hearing, with the consent of all the parties to the cause, *Dyson v. Morris,* 1 Hare, 413, 419; *Bozon v. Bolland,* 1 Russ. & Myl., 69; and in this instance the objection of want of consent cannot be taken."
>
> *Anderson v. Watt,* 138 U. S., 694, 704.

"1. Parties having notice of the pendency of

a suit in which they are directly interested must exercise reasonable diligence in protecting their interests, and if instead of doing so they wilfully shut their eyes to the means of knowledge which they know are at hand to enable them to act efficiently, they cannot subsequently turn round and evade the consequences which their own conduct and negligence have superinduced.

"2. The term 'parties,' as thus used, includes all who are directly interested in the subject matter, and who had a right to make defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment."

Robbins v. Chicago City, 71 U. S., 657 (4 Wall.).

"Such an appearance by attorney in open court without objection by any other party was effectual to make him a party to the proceedings."

In re Heldman's estate, 138 N. Y. S., 59, 153 Sup. Ct., App. Div., 583.

In *Wadley v. Blount, et al*, 65 Fed. 672, it was held by Goff, Circuit Judge, that one charged with fraud as was the Rock Island Company in the court below here, who appears before the master, although not named as a party, is "in effect a defendant to said suit."

"As Imhaeuser has appeared generally in the

suit, he has waived his right to object that he is not named as a defendant in the prayer for subpoena, and he has no concern with the naming of others in such prayer."

Buerk v. Imhaeuser, 8 Fed. 457.

In a creditors' suit such as this, "every creditor has an inchoate interest in the suit and is, in an essential sense, a party to the action."

Dobson v. Simonton, 93 N. C. 268.

"In all cases of this sort each creditor is entitled to appear before the master and may then, if he chooses, contest the claim of any other creditor in the same manner as if it were an adversary suit."

Story's Equity Jurisprudence, Sec. 745. (Fourteenth Ed.).

"Under such circumstances they are treated as parties to the suit."

Story's Equity Pleadings, Sec. 99 (Eighth Ed.).

"The practice of permitting judgment creditors to come in and make themselves parties to the creditor's bill, and so obtain the benefit, assuming at the same time their portion of the costs and expenses of the litigation, is well settled. And a proceeding of this sort will not be

reversed because the party so coming in has not obtained an order of court to come on; the want of such order not being objected to and the proceeding having gone on to its conclusion as if it had been obtained."

Myers v. Fenn., 5 Wallace, 205.

"Each creditor becomes a party to the suit, it is true, only *when he appears to prove his claim*. His right to proceed depends upon the fact of his being the owner of a valid claim against the corporation; but if he proves such a claim, then he does prove himself to be a creditor, and as such is entitled to come in under the decree, and has a right to be considered as a party complainant from the beginning by relation to the time of filing the bill."

Richmond v. Irons, 121 U. S. 27, 54.

"After a petition of intervention has been filed, and the issues raised thereon tried, an objection that there was no formal order of the court granting the intervener leave to intervene and file the petition will not be entertained."

People's Sav. Inst. v. Miles, 76 Fed. 252, 254, (C. C. A., 8th Cir.).

See also—

White v. Ewing, 159 U. S. 36-39.

Perry v. Godbe, et al, 82 Fed. 141 (D. C.).

French v. Gapon, 105 U. S. 509-525;
Illinois Steel Co. v. Ramsey, 176 Fed. 853-863, C. C. A. 8th Cir.

The case of *Merriam v. Saalfield*, 241 U. S. 22, relied upon by petitioner, is in no way in conflict with the foregoing cases and is not an authority supporting petitioner's contentions. The distinction between that case and the case at bar, is that there the plaintiff sought to maintain a supplemental bill against a person who had not entered his appearance and had not become a party and upon whom service could not be had within the district. In the case at bar, the Rock Island voluntarily appeared in its own name and in its own behalf and entered its appearance before the cross-bill was filed against it. In short, the distinction is that in this case the cross-bill was filed against a *party* while in *Merriam vs. Saalfield* the supplemental bill was filed against one *not* a party.

The point made by petitioner to the effect that its rights had been transferred to the bondholders' committee for the purpose of the suit, is, we submit, without merit, since the bondholders' committee could not represent innocent bondholders whose interests were opposed to those of the Rock Island Company on the issue of fraud raised by the answer of the stockholders'

committee. It was, therefore, proper for the Rock Island Company to intervene in its own behalf.

Williams v. Morgan, 111 U. S. 684, 696.

Hamlin v. Toledo, St. L. & K. C. R. Co., 78 Fed. 664-672, C. C. A. 6th Circuit.

Toler v. East Tennessee V. & G. Ry. Co., 67 Fed. 174; Lurtin, J.

Farmers' Loan & Trust Co. v. Northern Pac. R. R. Co., et al, 66 Fed. 169.

The record herein shows that all creditors were given leave by the District Court to intervene. It is true that the order fixed a time limit for such intervention, but as shown by the authorities hereinbefore cited, it was within the power of the court to extend this time limit, or even to ignore it if no party to the cause objected to an intervention perfected after the time limit had expired. That is what happened in the court below. The Rock Island Company was charged with fraud in the pleading filed by the stockholders' committee. Counsel for the bondholders' committee declined to act for the protection of the peculiar interests and rights of the Rock Island Company. Everybody in the case recognized that the Rock Island Company

must stand alone and nobody objected to its intervening. It might, of course, have allowed its interests to go unprotected and have refrained from appearing in the case. It saw fit, however, to appear in its own name and for its own protection, and manifestly for the purpose of combatting the claim of fraud asserted against it by the stockholders' committee and for enforcing its own bonds, if possible. If it had filed a pleading in its own name, it certainly would not be here in this court urging the present petition, for that would have furnished conclusive evidence that it had entered its appearance and made itself a party to the proceedings in the court below. The only reason it did not file a pleading was because its agent, the Bondholders' Committee, had filed one, of which it sought to take advantage.

The court below held that the steps which the Rock Island Company did take were as effectual to enter its appearance as if it had filed a pleading. The most that can be said for the pending petition, therefore, is that it seeks to obtain from this court a ruling that the court below erred in so holding. As the record is not here upon which the court below acted, it must be conclusively presumed that the evidence upon which it found that the Rock Island Company had entered its appearance was evidence justifying such finding. *In re Cooper,*

143 U. S. 472-506. The Rock Island Company having become a party to this suit, the court below had power to permit other parties in the suit to file amended pleadings, as was done with respect to the complainant, the stockholders' committee and The Western Union Telegraph Company, an intervening creditor, and to permit the defendant, which had not theretofore filed any pleading, to file an answer and cross-bill to the pleading which the bondholders' committee had filed in behalf of the Rock Island Company and certain other bondholders, and it was equally within the jurisdiction of the court upon proof that the Rock Island Company had notice of such new pleadings to require the Rock Island Company to answer them or suffer a decree *pro confesso*, and this, without the issuance of a subpoena. It is not necessary that a subpoena be issued upon the filing of amended pleadings or the filing of cross-bills against persons who are already parties to the pending litigation.

As we have shown, Equity Rule 31 provides what shall be done in such event, and was followed in the court below.

It follows from the foregoing that there is nothing in the fact that no subpoena was issued for the Rock Island Company upon the cross-bill which affects the jurisdiction of the District Court.

The Question as to Whether the Decision of the District Court Upon the Evidence, That the Rock Island Company Had Entered Its Appearance Was Right or Wrong Is Not Now Before This Court.

We have hereinbefore cited the decisions of this court establishing the rule that a writ will not issue in such a proceeding as this if the court had jurisdiction of the subject matter, even if its decision is apparently wrong.

In the present proceeding there is no record presented from which this court can determine that the decision of the court below was wrong. On pages three and four of the brief for petitioner we find some argument on the merits of the question as to whether the evidence showed that the Rock Island Company had entered its appearance, and on page four is the statement: "The only basis for the claim that the District Court has jurisdiction of the person of the Rock Island Company is that Mr. Maxwell entered its appearance by appearing as counsel for the bondholders' committee." (Return, page 21). This statement is denied in the return filed by the District Court, and it affirmatively appears in that return that the court received a great many items of evidence, of which the form of

Mr. Maxwell's original appearance was but one. As there is no record before this court of the evidence heard by the District Court, this court could not find, as claimed by the petitioner, that the decision of the court below was wrong even if this court under its practice could and would consider that question. The record here includes the finding of fact that the Rock Island Company did enter its appearance and this is conclusive on the present hearing.

> "* * * Where it appears that the court has jurisdiction of the subject matter, and that the defendant was duly served with process or voluntarily appeared and made defense, the decree is not open to attack collaterally."
>
> *In re Cooper*, 143 U. S. 472-506.

Its conclusion will therefore be conclusively presumed to be right.

> "The court had power to inquire into the fact upon which jurisdiction depended and its maintenance of jurisdiction involved the conclusion necessary to sustain it. If, therefore, the findings of fact are properly part of the face of the proceedings, the want of jurisdiction not only does not appear, but the contrary."
>
> *Ibid*, p. 509.

> "* * * We should be limited, on appeal,

in consideration of the case, to the question of law presented on the record.

"Upon the face of the libel, the facts found and the final decree the District Court clearly had jurisdiction. This petitioner had a remedy by appeal from that decree, which was inefficacious because of his neglect to have included in those findings the fact of the exact locality of the offense and seizure.

"Such being the case the writ of prohibition prayed for should not issue."

Ibid, 513.

The District Court Had Jurisdiction to Compel the Rock Island Company to Meet the Issues Tendered by a Cross-Bill Filed After It Had Entered Its Appearance.

If the contention of the petitioner were correct, cross-bills, set-offs and counter-claims would be unknown in Federal equity practice. All such cross-claims are ordinarily set up after the court has acquired jurisdiction of the party against whom they are asserted. Under equity rules 30 and 31 there can be no question but that a District Court proceeding in equity upon a creditors' bill may authorize the filing of a cross-bill, set-off or counter-claim, asserting for the first time a claim against the plaintiff or another defendant, as

the case may be, who has prior thereto come or been brought into the case. Petitioner's claim in this respect really amounts to nothing more than a claim that the court erred in permitting the filing of the particular cross-bill complained of by petitioner. As we believe we have shown, this point is not only not well taken, but could not possibly be considered by this court upon the present record.

We respectfully submit that the court below is proceeding strictly within the limits of its jurisdiction, in obedience to the rules prescribed by the Supreme Court for its guidance, and in accordance with ordinary equity practice, and that no reason is disclosed in the petition or by the brief for petitioner why the extraordinary remedy of a writ of prohibition or mandamus should be granted herein.

Respectfuly submitted,

THOS. H. TRACY,

GEO. D. WELLES,

Solicitors for The Toledo, St. Louis & Western Railroad Company and Amici Curiae.

IN THE

Supreme Court of the United States

October Term, 1920.

No. 84.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Appellant,

BRIEF

IN OPPOSITION TO THE PETITION.

JOSEPH P. COTTON,

THEODORE M. GORDON,

Solicitors for Some Plaintiffs-Appellees.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1920.

Original No. 24.

In re THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,

Petitioner.

BRIEF AGAINST THE PETITION FILED FOR RESPONDENT BY COUNSEL FOR BONA FIDE BONDHOLDERS.

This case arises on a petition for a writ of prohibition (or mandamus) directing the District Court of the United States, Northern District of Ohio, Western Division, not to proceed in a cause now before that Court, against the Chicago, Rock Island & Pacific Railway Company (herein called the Rock Island).

The petition and return differ as to very few facts but they differ very radically as to those facts and the differences are of first importance,—particularly as to whether the Rock Island is properly a party to the cause below and whether the relief sought against it is properly set up as a counterclaim.

The Allegations of the Petition.

The Ohio District Court in a proceeding in equity commenced by an Ohio creditor against an Indiana Railroad corporation, the Toledo, St. Louis & Western Railroad (herein called the Cloverleaf) has taken physical possession of the property of the embarrassed railroad in its District, and through a receiver is administering the property and adjudicating the claims of its creditors. The jurisdiction of the original proceeding is not challenged by the petitioner (see Petition for Writ, pp. 1, 2 and 3).

Among the claims filed against the property is an issue of $11,527,000 face amount of collateral trust bonds of the Cloverleaf which are alleged in default. The claim of these bonds is presented by cross-bills filed by a bondholders' committee (Merrill *et al.*) and by Central Trust Company of New York as trustee of the mortgage under which the bonds are issued (Petition, pp. 5 and 6).

The Cloverleaf in answer to the cross-bills sets up a defense to these bonds that they are void because they were obtained by the Rock Island Company by fraud. The petitioner does not challenge the jurisdiction of the District Court to determine whether this fraud constitutes a defense to the bonds (Petition, pp. 7 and 8).

This answer of the Cloverleaf (which is also called a cross-bill) also alleged that the Rock Island had entered its appearance in the cause, become a party to the cause, and rendered itself subject to the jurisdiction of the District Court and asked relief against the Rock Island Company, *i. e.*, that the Cloverleaf recover for the damages which it suffers as a result of the same fraud by

the Rock Island. The Cloverleaf answer, thus not only relied on the fraud as a defense to the bonds, but asked affirmative recovery from the Rock Island because of the fraud (Petition, pp. 9 and 10). Service of a copy of the answer was made upon the Rock Island as a party (*i. e.*, upon its solicitor, who also now appears for the Rock Island in this Court), and an order was entered requiring the Rock Island to reply to this answer (Petition, p. 10). The Rock Island moved to set aside the order and later moved to dismiss the claim made against it in the answer. Both motions were overruled by the District Court.

The Allegations of the Return Which Are Omitted from the Petition.

The Return sets out (pp. 8, 9, 10 and 11) that the Cloverleaf answer (or cross-bill) alleges that the Rock Island fraudulently by payment of a secret bribe to one of the Cloverleaf officers, caused the Cloverleaf to issue and deliver all the bonds in question, that the Rock Island disposed of all the bonds received by it except $5,447,000 face amount which were kept by it and are still owned by it, that $6,080,000 face amount are now held by holders who claim to hold such bonds in good faith and without notice of the fraud, and that the Cloverleaf asks (Return, p. 13) that all the bonds be declared void and (Return, p. 14) that it be compensated for the amount it has been and may be compelled to pay on these bonds, *i. e.*, the interest paid in the past and the amount it has to pay in the future on such bonds as are held by *bona fide* holders for value (all such damages whether past or future resulting from the same fraud of the Rock Island).

The Return sets out (p. 21) that the reply filed by the Rock Island to the answer (or cross-bill) of the Cloverleaf admits that $5,447,000 face amount of the bonds were at all times owned by the Rock Island up till 1914, when they were deposited with the Merrill Committee. The Merrill Committee were as the return (pp. 2, 3) shows merely a committee to enforce the bonds for the benefit of the Rock Island and the other depositors.

While the Return does not in such terms so allege it is clear from the facts thus stated that, to the extent of its bondholdings, the Rock Island was the real party in interest in the proceedings brought by the Merrill Committee and by the Trustee of the mortgage.

The most striking difference between the petition and the return is on the point of whether or not the Rock Island is a party to the creditors' bill.

The Return sets out

(*a*) that the Cloverleaf's answer (or cross-bill) alleges that the Rock Island had intervened in its own right and had become a party to the cause (Return, p. 12);

(*b*) that on hearing such answer evidence was introduced to prove such allegations (Return, p. 15) and the answer was filed and notice duly given to its solicitor, and service of such notice admitted by its solicitor as such (Return, pp. 16, 17).

(*c*) that such evidence was further considered by the District Court and

"From said evidence the court in the exercise of its judicial discretion found that the Chicago, Rock Island & Pacific Railway Company had entered its appearance in and had become a party to said cause and had

fully submitted itself to the jurisdiction of said court for all proper purposes as a party thereto" (Return, pp. 16, 17).

and the court then entered an order embodying this finding, and on new motions by the Rock Island the Court again heard evidence on the point and overruled the objection of the Rock Island (Return, pp. 18, 19, 20).

(*d*) The Return states categorically (p. 21) that the evidence upon which the Court so acted (in holding the Rock Island a party) is not set out in the petition, that the statement in the petition as to the basis or reason of such ruling is incorrect and does not show all the evidence before the Court, and (Return, p. 22) that petitioner took no steps to have certified a record of the evidence submitted on said hearings, nor to review such orders on appeal or error proceedings.

This Court Will Dismiss the Petition for the Writ.

On the record as above stated by which it appears that the determination by the District Court that the Rock Island was a party, was made on evidence of which no record is before this Court—this Court may not on this application review the correctness of the determination. Since the evidence is not before this Court, this Court cannot reach the conclusion that the District Court was incorrect in its determination. *In re Cooper*, 143 U. S. 472, 506, 507.

Assuming, then, for the purposes of this hearing, that the Rock Island was a party to the main cause, it must follow that in accordance with the Equity

Rules the counterclaim of the Cloverleaf for affirmative relief against the Rock Island must be within the jurisdiction of the District Court (entirely without regard to citizenship of the two corporations or whether the District Court would have had original jurisdiction of the claim which is now asserted as a counterclaim) and the procedure was correct.

Thus the Second Paragraph of Equity Rule 30 provides:

> "The answer must state in short and simple form *any counterclaim arising out of the transaction which is the subject matter of the suit*, and may, without cross bill, set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him, and such set-off or counterclaim, so set up, shall have the same effect as a cross suit, so as to enable the court to pronounce a final judgment in the same suit both on the original and cross claims."

Rule 31 in part provides:

> "If the answer include a set-off or counterclaim the party against whom it is asserted shall reply within ten days after the filing of the answer, unless a longer time be allowed by the court or judge. If the counterclaim is one which affects the rights of other defendants they or their solicitors shall be served with a copy of the same within ten days from the filing thereof, and ten days shall be accorded to such defendants for filing a reply."

Rule 37 in part provides:

> "Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust * * * may sue in his own name without joining with him the party for whose benefit the action is brought. All per-

> sons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff."

And again:

> "Any one claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

It is quite clear that this counterclaim of Cloverleaf against Rock Island (concerning which the writ is now asked) is one (in the language of Equity Rule 30 above quoted) "arising out of the transaction which is the subject matter of the suit," and ancillary to the main proceedings by creditors. The suits brought by the Merrill Committee and the Trustee of the mortgage to enforce the bonds (which were certainly brought in the interest of Rock Island) necessarily had as their subject matter the fraud which is urged as a defense to the bonds and the *bona fides* of the bondholders, which is the answer to the fraud, and that same fraud and the disposal of the same bonds by Rock Island to *bona fide* holders is the basis of the Cloverleaf's counterclaim. Nor can there be any doubt that the practice in giving notice to the Rock Island (which has since filed an answering pleading) is correct.

But if this Court were in doubt as to the correctness of the determinations of the District Court —nevertheless it is submitted that this Court may not grant the writ of mandamus. The questions as to whether the Rock Island was properly a party, as to whether this was a "counterclaim", and as to whether the practice was correct, were jurisdic-

tional questions depending on the evidence presented. The District Court had the right to hear such evidence and reach a determination as to whether or not it had jurisdiction—and its determinations, completely reviewable by error proceedings, may not be questioned by writ of prohibition or mandamus,—particularly where the evidence is not before the Court.

The Petitioner's Contentions.

The petitioner contends (see his Brief, p. 2) that the petitioner has no adequate remedy except by writ of mandamus, quoting *In re Winne*, 213 U. S. at page 467, as follows:

> "An appeal or writ of error, at the end of long and expensive proceedings, which must go for naught if the District Court is without jurisdiction, is not an adequate remedy."

That authority is expressly disapproved by a later decision of this Court in *Ex parte Harding*, 219 U. S. 363.

The discretion of this Court to issue a writ of prohibition or mandamus will not be exerted to review the question of jurisdiction where there is otherwise adequate remedy by appeal or writ of error. *Ex parte Nebraska*, 209 U. S. 436; *Ex parte Harding, supra; Ex parte Oklahoma*, 220 U. S. 191, 209; *Ex parte Tiffany*, 252 U. S. 32, 37.

And the power to issue the extraordinary writ of prohibition or mandamus is only exerted when it is clear that the Court whose action it is sought to prohibit had no jurisdiction of the cause. *In re Huguley Mfg. Co.*, 184 U. S. 293, 301.

On these authorities we deem it clear that this Court will not by writ of prohibition or mandamus

review the questions of fact (determined upon evidence by the District Court) whether the petitioner did become a party to the cause and/or whether the action against him be properly a counterclaim—much less will this Court by such writ review the proceedings of the District Court where the evidence on which the determination of the District Court was made is not before it.

The petitioner also relies in support of his contentions on the case of *Merriam* v. *Saalfield*, 241 U. S. 23. We submit that that case is not authority for the plaintiff's contention and that it does not present a parallel case.

The *Merriam* case arose on appeal from a District Court. The question before this Court was as to the jurisdiction of the District Court to make and enforce a final decree *in personam* against one Ogilvie. An original bill had been filed by plaintiff against one Saalfield for relief against unfair competition and a decree was entered against Saalfield with an order of reference for accounting. Thereafter a supplemental bill was filed setting up that Ogilvie had actually directed Saalfield's defence through his own counsel and that pending the litigation Saalfield had assigned his business to a corporation, and by reason of such facts Ogilvie became an actual though not nominal party to the suit. Substituted service was made on the counsel who had appeared for Saalfield but who were alleged to have been employed by Ogilvie. A decree *pro confesso* was entered against Ogilvie for recovery of profits. He then appeared specially moving to quash the service of the writ of subpœna and to set aside all proceedings based thereon, and that motion was granted by the District Court, and it was from the granting of that motion that the appeal was taken.

This Court affirmed the correctness of the ruling of the District Court in its order on that motion.

The opinion of this Court assuming that the decree against Saalfield was final (p. 29) pointed out that the sufficiency of the proceedings by substituted service depended upon whether the supplemental bill was a "dependent" or "ancillary" bill, the jurisdiction of which followed the jurisdiction of the original cause. This Court pointed out that Ogilvie was not a party to the record, nor did the fact that he had taken charge of Saalfield's defence put him in a position where he could be treated as an actual party, and decided that the supplemental bill was not "dependent upon" or "ancillary to" the original suit against Saalfield, saying (p. 30):

> "But the merits are not to be adjudicated against him until he is brought into a Court and as against him the supplemental bill is an original not an ancillary proceeding."

And at page 31 this Court said:

> "No case to which we are referred, nor any other that we have found, goes to the extent of sustaining as an ancillary proceeding a bill interposed for the purpose of obtaining a decree *in personam* against a party on the ground that he had participated in the defence of a previous action against another party so as to become bound upon the doctrine of *res judicata*."

It is submitted the *Merriam* case is, both as to the precise facts and as to the reasoning of the Court, entirely distinguishable.

(1) In the case at bar the person over whom jurisdiction is claimed became a formal party. And the failure of that fact in the *Merriam* case was

given by this Court (p. 29 of their opinion) as a reason for their decision that the District Court had not jurisdiction.

(2) In the *Merriam* case the third party Ogilvie had never made any affirmative claim for relief and his activity was purely defensive. In the present case the Rock Island, through the bondholders' committee and the trustee of the mortgage, instituted and engaged in proceedings for the enforcement of their bonds.

(3) In the *Merriam* case the action against Ogilvie was not "ancillary" or "dependent" upon the action against Saalfield, although it arose out of the same state of facts. In the present case the action against the Rock Island is "ancillary" or "dependent". That a proceeding by way of counterclaim is "ancillary" or "dependent" upon the main proceeding so that it may be maintained in the Federal Court (even although as an original proceeding the Federal Court would not have had jurisdiction over it) has been precisely decided by this Court in *Deucy* v. *West Fairmont Gas Coal Co.*, 123 U. S. 329, 333. And this Court has also decided that where a creditor's suit has been commenced and the assets of a corporation are in the hands of the Federal Court for administration for the benefit of its creditors, that Court has jurisdiction to proceed to collect claims owing to the corporation (although such claims be claims of which that Court would not have had jurisdiction if they had been original proceedings), and such proceedings for the collection of claims have been termed by this Court "ancillary" to the main proceedings (see *White* v. *Ewing*, 159 U. S. 36, 39).

(4) The Equity Rules above quoted expressly provide for assertion of counterclaims in equity causes pending in the Federal Courts by substituted service, thereby in effect classifying counterclaims arising out of the same transaction as "dependent".

It is submitted therefore that *Merriam* v. *Saalfield* is not an authority for the petitioner's contention.

The truth is that the only difference between the counterclaim against the Rock Island in the present case and any other counterclaim is that the record before this Court does not show that the Rock Island ever filed a pleading entitled in its own name setting out the state of facts on which it asked affirmative relief. But the record does show that such a proceeding was filed in its behalf by the Merrill committee and again by the trustee of the mortgage, both for affirmative relief for the benefit of the Rock Island, and that the Rock Island became a formal party for the assertion of its rights in the District Court, and under such circumstances the Rock Island may not be heard—least of all in this proceeding—to hold this technicality as a shield against answering for its fraud.

This brief is filed for the respondent by counsel employed by the Merrill Committee of Bondholders to represent the interest of depositors whose bonds (known as Series A bonds) were acquired before maturity for value and without notice of the alleged fraud of the Rock Island Company. This is the same Committee which holds the bonds owned and deposited by the Rock Island Company.

J. P. Cotton,
T. M. Gordon,
Solicitors.

SUPREME COURT OF THE UNITED STATES.

No. 24 Original.—October Term, 1920.

In re Chicago, Rock Island & Pacific Railway Company, Petitioner. } On Petition for Writ of Prohibition and/or Writ of Mandamus.

[February 28, 1921.]

Mr. Justice Brandeis delivered the opinion of the Court.

The Chicago, Rock Island & Pacific Railway Company, commonly called the Rock Island, filed in this court a petition in which it alleged that the District Court of the United States for the Northern District of Ohio, Western Division, was undertaking to proceed against it personally in a suit therein pending; that the Rock Island had not voluntarily become a party to the suit, had not been served with process, and could not under Section 51 of the Judicial Code be made a party without its consent, since it was organized under the laws of Illinois and Iowa and was not a citizen or resident of Ohio; and it prayed for a writ of prohibition, or in the alternative a writ of mandamus, to prevent the court from proceeding further against it. The suit in which it is sought to proceed personally against the Rock Island is one brought by an Indiana stockholder of the Toledo, St. Louis and Western Railroad Company, an Ohio corporation, for the appointment of a receiver for that corporation. The particular proceeding by which the personal liability is asserted is a cross-bill which was filed by the Toledo Company against the Rock Island after the appointment of the receiver and after the Rock Island had appeared before a special master for the purpose of protecting its interests in an issue of the Toledo Company's bonds. A rule was granted and the case is now before us on the petition and return. The main questions argued here were whether upon the facts there stated the Rock Island had become a party to the suit and subjected itself generally to the jurisdiction of the court; and,

if it had not, whether the case is one which entitles the petitioner to either of the extraordinary remedies applied for.

There is a well-settled rule by which this court is guided upon applications for a writ of prohibition to prevent a lower court from wrongfully assuming jurisdiction of a party, of a cause, or of some collateral matter arising therein. If the lower court is clearly without jurisdiction the writ will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. *Ex parte Rice*, 155 U. S. 396. If, however, the jurisdiction of the lower court is doubtful, *In re Muir*, decided by this court January 17, 1921; or if the jurisdiction depends upon a finding of fact made upon evidence which is not in the record, *In re Cooper*, 143 U. S. 472, 506, 509; or if the complaining party has an adequate remedy by appeal or otherwise, *Ex parte Tiffany*, 252 U. S. 32, 37; *Ex parte Harding*, 219 U. S. 363; the writ will ordinarily be denied. Tested by this rule the case presented by the petition and the return does not entitle the Rock Island to this extraordinary remedy.

The original bill filed against the Toledo Company in the Northern District of Ohio, Western Division, alleged, among other things, that it had defaulted on an issue of $11,527,000 Collateral Trust Gold Bonds, secured by stock of the Chicago and Alton Railroad Company held by the Central Trust Co. of New York, as Trustee for the bondholders. These bonds were divided into two classes having somewhat different rights and interests. A single bondholders' committee was formed to protect both classes of bonds. Of the "A" bonds $6,480,000 were outstanding; and of these $5,248,000 were deposited with the committee,—$400,000 of them by the Rock Island. Of the "B" bonds $5,047,000 were outstanding all of which were deposited with the committee by the Rock Island. The special master was directed to ascertain and report the amount, character, lien and priority of all claims; and creditors were notified to present before him their respective claims duly verified, or to file bills of intervention. The bondholders' committee then filed a petition praying that the suit be dismissed as collusive and, in the alternative, that judgment be rendered for the committee in the amount of the face value of

the bonds held by it, aggregating $10,295,000 and accrued interest. To that petition an answer in the nature of a cross-bill was filed by the plaintiff who prayed that the committee's petition be held to be an intervention, that the receiver be directed to defend against the bonds held by the committee, and that these bonds be ordered surrendered, if found to be invalid. By leave of court, the committee withdrew its petition, and sought its relief by a dependent bill. An order was thereupon entered making the committee a party defendant to the original bill with leave to answer and file a cross-bill. This it did; and the Central Trust Company also filed a cross-bill to foreclose the lien on the Chicago & Alton stock held as security for the Collateral Trust Bonds. An order was then made referring the case, on the issues raised by the several pleadings, to the special master to take testimony and report.

At the beginning of the taking of testimony before the special master the appearances of counsel were formally noted by the master, among others, as follows:

"Lawrence Maxwell, Esq., and J. P. Cotton, Esq., appearing for the Bondholders' Committee, Mr. Maxwell appearing to represent the interest of the Rock Island Company, and Mr. Cotton representing the 'A' bonds."

Thereafter the Toledo Company filed an answer and cross-bill in which it claimed, among other things, that the whole issue of the Collateral Trust Bonds was void on account of fraud practiced by the Rock Island; that the Rock Island was liable for all amounts theretofore paid by the Toledo Company on the bonds in excess of dividends received on the Chicago & Alton stock; and that it was liable also for all amounts which the Toledo Company might be required to pay thereafter on account of any of the series "A" bonds which the court should hold to be valid obligations because they had passed into the hands of innocent holders. The cross-bill of the Toledo Company prayed that the necessary accounting be had; that the Rock Island be declared to be a party; that it be required to answer; and that in default of answer a decree be entered against it *pro confesso*. An order was entered in accordance with the prayer of the bill and notice thereof was served on

Mr. Maxwell as its solicitor. His name had not appeared as counsel on any pleading filed by the committee.

The Rock Island then filed a motion which stated:

"Appearing solely for the purpose of the motion and not intending to submit itself to the jurisdiction of this Court as a party to this suit, moves the Court to set aside its finding in the order entered herein March 11, 1918, that the Chicago, Rock Island and Pacific Railway Company has heretofore entered its appearance as a party to this suit and its order . . . ; on the ground that the court was without jurisdiction to make said order, or over the defendant as a party to the cross-bill."

This motion was overruled and an order was entered requiring answer within twenty days. Thereupon a further motion was made by the Rock Island in which, renewing its claim that it had not entered its appearance and asserting that the court was without jurisdiction over it as a defendant to the Toledo Company's cross-bill,

"or at all, especially in respect of the pretended cause of action therein set forth for the recovery of moneys from it, moves to dismiss so much of said cross-bill as seeks to recover moneys from the Chicago, Rock Island and Pacific Railway Co. upon the ground that it is not suable in this suit in this District upon said pretended cause of action, not being an inhabitant of the District or of the State of Ohio, and neither it nor the Cross Complainant being a resident of the District or State."

This motion also was overruled; and thereupon this petition for a writ of prohibition or of mandamus was filed.

The return of the District Court stated that the Toledo Company's answer had alleged that the Rock Island had intervened in its own right and had become a party to the cause; that at the hearing upon such answer evidence was introduced; and that service thereof was admitted by its solicitor as such. The return further recited:

"The evidence upon which the court acted in making the findings and orders of which complaint is made in said petition is not set out in said petition. Respondent denies the statement in the brief for petitioner that 'The only basis for the claim that the District Court has jurisdiction of the person of the Rock Island Company is that Mr. Maxwell entered its appearance by appearing as counsel for the Bondholder's Committee.' The original entry

of appearance by Mr. Maxwell quoted in the petition and in the brief is only one item out of a large number of items of evidence considered by the court on this point.

"No steps were taken by petitioner to preserve and have certified a record of the evidence submitted on the hearings of said motions or to obtain a review of the orders complained of by appeal or error proceedings."

It is argued on these facts that the District Court did not acquire jurisdiction to enforce the personal liability of the Rock Island asserted in the cross-bill of the Toledo Company; but, applying the rule stated above, that question should not be decided in this proceeding. The most that can be said against the District Court's jurisdiction is that it is in doubt. And the return recites that the order which declared that the Rock Island became a party rests upon evidence which has not been embodied in the record. The immunity of the Rock Island from suit in the Northern District of Ohio, conferred by Section 51 of the Judicial Code could be waived, *In re Moore*, 209 U. S. 490; and ordinarily a general appearance operates as a waiver. *Gracie* v. *Palmer*, 8 Wheat. 699. The District Court obviously had jurisdiction to determine, in the first instance, whether the Rock Island had entered a general appearance. *Jones* v. *Andrews*, 10 Wall. 327. It had jurisdiction also to determine whether the relief sought in the Toledo Company's cross-bill was in its nature germane to the proceedings theretofore instituted in the suit by the bondholders' committee or by the Central Trust Company, so that the rights asserted in the cross-bill could be properly litigated in that suit. *Chicago, etc. Ry. Co.* v. *Chicago Bank*, 134 U. S. 276, 287. And finally, it had jurisdiction to determine whether the fact that such earlier proceeding had been instituted on behalf of the Rock Island, that it had actively participated in the conduct thereof, and to that end had entered a general appearance, made it subject to further proceedings thereon by way of cross-bill, as fully as if the earlier action had been taken in its name as well as on its behalf. Compare also *Ex parte Gordon*, 104 U. S. 515; *Globe Refining Co.* v. *Landa Cotton Oil Co.*, 190 U. S. 540; *In re Pollitz*, 206 U. S. 323. If in the judgment of the Rock Island the District Court erred in the decision of any one or all of these questions it will have its remedy by appeal, unless it

has failed to preserve by appropriate procedure that right of review. The same considerations lead to a denial also of the writ of mandamus. *Ex parte Roe*, 234 U. S. 70.

Rule discharged and petition dismissed.

Mr. Justice DAY took no part in the consideration or the decision of this case.

A true copy.

Test:

Clerk Supreme Court, U. S.